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POLITICAL SCIENCE QUARTERLY.

ASYLUM IN LEGATIONS AND CONSULATES AND IN VESSELS. III.

V. *Diplomatic Asylum in International Law.*

It is universally admitted that the rights and immunities of a public minister are intended to secure his independence in the discharge of his functions as the representative of a foreign government. In order that he may act with perfect freedom, he and his suite are exempt from the local law. This exemption is called extraterritoriality, as if the minister and his suite were in contemplation of law to be regarded as being outside of the territory in which they reside.[1] In order further to insure the freedom and independence of the diplomatic agent, it is held that his domicile is not subject to the visitation of the ordinary officers of the revenue and the police.[2] This exemption constitutes what is called the inviolability of the diplomatic residence. By a confusion of ideas, this inviolability is often referred to as extraterritoriality, and in consequence writers have frequently been led to state that a minister's domicile is foreign territory and in no wise subject to the local law. Among publicists of modern authority Lorimer stands pre-eminent for the positiveness with which he asserts this theory. "An English ambassador," he declares, "with his family and

[1] Lorimer's Institutes, p. 249. This writer states, however, that if a diplomatic person purchase property or engage in speculation, he becomes in respect to such transactions amenable to the local law. Fiore maintains the exceptional view that a public minister is answerable to the local law for his criminal acts. Droit Int. Pénal, § 22 *et seq.*

[2] Writers are generally in accord on this point. For a case in the United States, see U. S. *vs.* Jeffers, 4 Cranch C. C. 704.

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his suite, whilst abroad in the public service, is domiciled in England and his house is English ground." This statement would carry great weight, if the learned author did not reject its consequences by declaring that a legation cannot be used as an asylum, unless for the minister and his family and suite. This, however, can scarcely be called asylum, since the individuals themselves are personally exempt from arrest. But if an English legation be English ground, why is it that it cannot be used as an asylum to the same extent as any other British territory? In reality, when writers have referred to the extraterritoriality of a minister's domicile, they have employed the term loosely and figuratively, and have either expressly or impliedly rejected the theory that such domicile is actually extraterritorial, or that it is a part of the territory of the state which the minister represents.

Foelix says that the house of a public minister "enjoys an entire freedom, in that it is not accessible to the officers of justice of the country: it is considered as being outside of the territory, as well as the person of the minister."[1] Nevertheless he states that nations do not recognize "the right of asylum in the hotel of a foreign minister" or the "freedom of the quarter of the city in which his hotel is" or "the exemption of the latter from taxes which apply to immovable property."[2] Vattel regards "the house of an ambassador" simply as "independent of the ordinary jurisdiction," since

> no magistrate, justice of the peace or other subordinate officer is in any case entitled to enter it by his own authority, or to send any of his people to enter it, unless on occasions of urgent necessity, when the public welfare is threatened with imminent danger which admits of no delay.

The case should, he maintains, rather be submitted to the sovereign of the country, to whom it pertains to decide how far the claims of the ambassador are to be respected.[3] As has been seen, Vattel entirely approved the action of the Spanish government in the case of Ripperda.[4] The same opinion is

[1] Traité du Droit Int. Privé, vol. i, p. 417. [2] *Ibid.* [3] Pp. 494 *et seq.*

[4] *Cf.* this QUARTERLY for March, 1892, p. 13. In order to avoid any erroneous inference from my previous statement of the Ripperda case, I desire to say that while

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expressed by the Spanish jurisconsult, Riquelme,[1] and by Phillimore.[2] Bello also states that if the minister abuses his immunity by affording asylum to the enemies of the government, the sovereign may have the house of the minister surrounded, and may even take the accused by force.[3] In accord with this view are G. F. de Martens,[4] Baron C. F. de Martens,[5] Klüber,[6] Heffter,[7] Pinheiro-Ferreira,[8] Bluntschli,[9] Burlamaqui,[10] Eschbach,[11] Wicquefort,[12] Wildman,[13] Woolsey,[14] Halleck[15] and Wheaton.[16] Field cites on the question Foelix and Heffter.[17] Twiss refers

several historians state that the duke betrayed to the British minister the secrets of the Spanish government, that government did not allege or base its action on any such ground. It justified the arrest of the duke as a measure within its competence, and not violative of the rights of ambassadors, at the same time referring to the dangers which would menace governments if their ministers, who had been entrusted with the power and interests of the state, could find refuge in an embassy. It appears that Ripperda came uninvited to the British embassy, after having been refused asylum at the Dutch, and that he was permitted to remain at the former only after assuring the British ambassador that he was not in disgrace (he had been dismissed from office on a pension) or charged with crime. Subsequently the ambassador had an audience of the king and was assured that the duke might remain in the embassy, it being understood that he was not to be permitted to escape and that some soldiers would be placed about the embassy as a precaution against any attempts in that direction. The Spanish government, however, alarmed at the discovery that the duke had taken important papers with him, sent officers to seize him, without previously communicating the resolution of the Council of Castile to the ambassador and demanding Ripperda's surrender. This summary and forcible termination, without notice, of the asylum to which the king had consented, formed the basis of the British government's complaint, the British secretary of state, the Duke of Newcastle, expressly stating that, without deciding whether the ambassador had or had not the right to protect Ripperda, an opportunity should under the circumstances have been afforded to deliver him up, before resort was had to an act of force.

[1] Elementos de Derecho Público Internacional (Madrid, 1849).

[2] Phillimore says that on "the valuable and necessary immunity" of the minister's residence from the visitation of "the ordinary officers of justice and revenue," there was "at one time grafted the monstrous and unnecessary abuse of what was called the right of asylum." Vol. ii, p. 241, cciv.

[3] Principios de Derecho Internacional.

[4] *Cf.* this QUARTERLY for March, 1892, p. 15.

[5] *Ibid.* p. 25. [6] Droit des Gens, § 208. [7] Droit Int. Public, § 212.

[8] Cours de Droit Public, vol. ii, p. 195. [9] Droit Int. Codifié, 200.

[10] Principles, *etc.*, Nugent's ed., vol. ii, p. 371.

[11] Introduction Générale à l'Étude du Droit, p. 90.

[12] Embassadors, Digby's ed., p. 266. [13] International Law, 127.

[14] International Law, § 92. [15] International Law, vol. i, p. 295.

[16] Elements of International Law, Lawrence's ed., 1863, p. 417.

[17] Int. Code, 143.

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to the "fiction of extraterritoriality," and says that an ambassador's house cannot be converted into an asylum.[1] He approves Bynkershoek's statement "that all the privileges of ambassadors have one and the same object in view, namely, to enable them to discharge the duties of their office without impediment or restraint." Of the same opinion is Manning, who also speaks of the "fiction" of extraterritoriality.[2] Pradier-Fodéré holds the same view as C. F. de Martens, though he states that the question of asylum is still agitated in South America.[3] Bar maintains that

> the rights of extraterritoriality which ambassadors enjoy do not import that their houses are to be treated as if they were really beyond the territory, but merely as protecting the person of the ambassador from the jurisdiction of the state and its criminal law.[4]

Calvo holds that "in the midst of civil disturbances" a minister's dwelling can and ought to offer an assured refuge "to political persons whom danger to life forces on the moment to take refuge there." To this extent he maintains that asylum has been respected in Europe as well as in America, but he does not advocate the theory of extraterritoriality, and he lays down the following limitations of the inviolability of a minister's domicile:

> The dwelling of a public minister is inviolable in so far as it affects things indispensable to his official service and to the free and regular exercise of his functions; but whenever the conduct or the imprudent attitude of a diplomatic agent puts in peril the peace of the state, violates or tends to elude the laws of the country, by converting, for example, the legation into a refuge for criminals or into a habitation of conspiracy against the established government, the privilege of inviolability of domicile disappears, and the offended state is fully warranted in refusing to the dwelling of the agent the benefit of an immunity which reason and justice cease to sustain.[5]

As affecting the question of extraterritoriality, it may be observed that it is sometimes stated that a diplomatic agent

[1] Law of Nations, vol. i, § 218.
[2] Comm. on the Law of Nations, Amos's ed., p. 112.
[3] Cours, *etc.*, pp. 70–76.
[4] Int. Law, § 154.
[5] Droit International, 4th ed., § 1521.

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possesses the power to administer justice upon those attached to his legation or belonging to his suite. Félice thought that an ambassador might exercise such jurisdiction, but not to the extent of executing infamous or capital punishments, which was an attribute of "territorial supremacy."[1] Wheaton and Twiss cite Vattel and the older writers, who state that a minister may exercise criminal as well as civil jurisdiction over those attached to his embassy, but they also say that the modern usage is to send such persons home for trial.[2] Heffter states the law as it exists at the present day, when he says that it is only in Turkey and other non-Christian states that foreign ministers are invested with the right to decide upon disputes among their countrymen or even among the members of their suites. This view is entirely accepted by Lawrence, who, in his invaluable edition of Wheaton, says that the proposition in the latter's text "seems to have been transferred from one elementary treatise to another without due examination."[3]

The inadmissibility of the theory of the extraterritoriality of a diplomatic residence is further shown by the state of the law touching marriages celebrated in such a habitation. The general rule is that the validity of a marriage ceremony is determined by the law of the place at which the ceremony is celebrated — the *lex loci celebrationis*. Since it is often difficult for persons temporarily sojourning in a country to comply with the forms imposed by that law, foreigners have often betaken themselves to their respective legations and procured the performance of the ceremony there in accordance with the forms prevalent in their own country, without observance of the requirements of the law of the country in which they may happen to be. How far such a ceremony may be valid in the country to which the parties belong, is a question determinable by the law of that country. But it is conceded that the international validity of

[1] Leçons, vol. ii, pp. 555, 556.

[2] Abdy's Kent, ed. 1866, p. 132.

[3] Lawrence's Wheaton, ed. 1863, note 133. See also Wharton's Comm. on Law, § 167, where authorities are cited under the proposition that a minister's extraterritoriality "no longer gives, . . . as was once supposed to be the case, the power to execute penal discipline upon his subordinates."

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such a ceremony is at least doubtful, and it has been decided in France that foreigners cannot evade the law of that country by such an expedient.[1] When Mr. Cass was Secretary of State of the United States he issued instructions, which have never been revoked, inhibiting the performance of marriage ceremonies in legations of the United States.[2] He doubtless was led to take this step by an investigation he made of the subject on the occasion of the marriage of his daughter, while he was minister to France, to the American secretary of legation. After consulting the most eminent French lawyers, Mr. Cass obliged the parties, notwithstanding their personal immunities, to be married at the mayoralty and to fulfil all the requirements of the Code Napoléon.[3]

The unsoundness of the idea of extraterritoriality is further shown by the enforcement of the local law in respect to criminal offences committed by non-diplomatic persons in the hotel of a public minister. When Nitchencoff, a Russian subject, committed a murderous assault on M. de Balsh in the house of the Russian ambassador in Paris, he was tried by the French courts and sentenced to imprisonment for life. The Russian government having claimed that he should be given up for trial in Russia, the Court of Cassation decided on appeal that

> the fiction of the law of nations, according to which the house of an ambassador is reputed to be a continuation of the territory of his sovereign, only protects diplomatic agents and their servants, and does not exclude the jurisdiction of French courts in case of a crime committed in such a locality by a person not belonging to the embassy, even although he is a subject of the nation from which the ambassador is accredited.[4]

Had Nitchencoff been given up, he could have been tried under the laws of Russia as a Russian subject, without reference to the particular place in which the offence was committed. Let us suppose, however, that the crime had been

[1] Lorimer's Institutes, 251, citing Fraser, Husband and Wife, vol. ii, pp. 1312, 1529; *Journal du Droit International Privé*, 1890, p. 808.

[2] For. Rel. 1887, p. 279. [3] *Albany Law Journal*, vol. xi, p. 34.

[4] *Solic. Journal*, vol. x, p. 56, November 18, 1865.

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committed by a citizen of the United States in the British legation in Washington. If that legation be "English ground," the laws of the United States do not extend over it and, with a few exceptions, they do not provide for the punishment of offences committed by our citizens on foreign territory. Nor could the culprit have been sent to England for trial, since there is no law or treaty to warrant it. He would therefore have been exempt from punishment.

Since the practice of asylum is not sanctioned by international law, it can be defended only on the ground of the consent of the state within whose jurisdiction it is sought to be maintained. This view has been accepted by the government of the United States in its *Printed Personal Instructions to Diplomatic Agents*, which read as follows:

Par. 46. Immunity from local jurisdiction extends to the diplomatic agent's dwelling-house and goods and the archives of the legation. These cannot be entered, searched or detained under process of local law or by the local authorities.

Par. 47. This privilege, however, does not embrace the right of asylum for persons outside of the agent's diplomatic or personal household.

Par. 48. In some countries, where frequent insurrections occur and consequent instability of government exists, the practice of extraterritorial asylum has become so firmly established, that it is often invoked by unsuccessful insurgents, and is practically recognized by the local government, to the extent even of respecting the premises of a consulate in which such fugitives may take refuge. This government does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its agents to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct its representatives that it will not countenance them in any attempt to knowingly harbor offenders against the laws from the pursuit of the legitimate agents of justice.[1]

The statement that in certain countries the granting of asylum is "practically recognized," is significant. It means that the practice has existed, not as a right derived from positive law or from custom, but as a privilege resting on sufferance.

[1] Wharton's Int. Law Dig., § 104.

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Nowhere has it received the sanction of positive law. It is impossible, in view of the results of our investigations, to maintain that it has acquired even in America the force of a legal custom, or of a usage so certain and undisputed as to possess legal validity. The concession of temporary shelter to a fugitive hunted by a mob can scarcely be regarded as the exercise of a right of asylum. An unlawful assembly cannot claim any right to have possession of its intended victim, nor would it be justifiable without cogent reasons to hurl a fugitive into the power of his lawless pursuers. Nevertheless, a public minister is bound to keep aloof from the domestic controversies of the country in which he resides and to refrain from making his residence a place of resort for political leaders who believe themselves to be in danger. His conduct should be guided by the following rules:

1. In no case is a minister to offer his dwelling as a resort for refugees.

2. If a fugitive, uninvited, applies for protection, it is to be accorded only when his life is in imminent danger from mob violence, and only so long as such imminent danger continues.

3. A minister is bound to refuse asylum to persons fleeing from the pursuit of the legitimate agents of the government, and, in case such persons have been admitted, he must either surrender or dismiss them.

4. A minister is obliged strictly to abstain, except under the conditions and limitations prescribed by rule 2, from receiving or retaining persons who are engaged in political agitation, or who, though not formally accused, inspire the government with distrust.

In the foregoing rules no exception is made in favor of political offenders, nor can such an exception be supported on legal principles. Assuming that a state is not, by reason of the irresponsibility of its government or the character of its legal system, denied the rights of sovereignty, it possesses exclusive jurisdiction over its territory and inhabitants. This jurisdiction is as absolute in the case of political as of common offenders. Indeed there was logic in the old rule which tolerated asylum

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for common but not for political offenders, since the exercise of sovereignty is peculiarly involved in the protection by each state of its own political institutions. As has been shown, the granting of asylum to political offenders was simply the transformation of a decaying abuse, which sprang up in times when the principle of territorial sovereignty was not fully established and when the privileges of ambassadors were greatly exaggerated. It is because of the failure to consider asylum in its true legal aspect as a derogation from the sovereignty of the state, that writers have sometimes seemed to suppose that an exception might be made in favor of one class of offenders as against another; and it is in consequence of the attempt to make such an exception that we have constantly witnessed, in the course of our investigations, the intervention of diplomatic and even consular officers in the affairs of the country in which they reside, by making their houses a base of operations for those engaged in political strife.[1]

VI. *Asylum in Vessels.*

1. *Ships of War.*

It is generally stated that a ship of war is not subject to the local jurisdiction in a foreign port.[2] This exemption is by some writers maintained to be so absolute as to amount to extraterritoriality.[3] Ortolan,[4] Maine[5] and Testa[6] treat the surrender of

[1] In his edition of Bello (1883, note HH, p. 332), Don Carlos Martinez Silva in a burst of enthusiasm declares that in Spanish America the practice of asylum has been "a benefit to all and an injury to none." I shall not transgress the bounds of moderation by saying that it has been an injury to all and a benefit to none, though it would not be difficult to prove that the curse of most American republics has been the state of "chronic revolution," of which diplomatic asylum has been so important an adjunct. It is doubtless true that many persons have humanely been shielded from mob violence, but it is also true, as was declared by Albertini, a Peruvian lawyer and diplomatist, in a work published in 1866, that "unheard-of abuses," as well as acts of humanity, have been committed in the name of asylum. Derecho Diplomático, pp. 151, 152.

[2] Levi, Int. Law, p. 114; Wheaton's Elements, part 2, ch. 2, § 95; Ferguson, Int. Law, § 112; Calvo, § 1550.

[3] Cauchy, Le Droit Maritime Int., p. 157; Halleck, Int. Law, Baker's ed., vol. i, p. 176; Creasy's First Platform, p. 193.

[4] Dip. de la Mer, vol. i, p. 267.

[5] Int. Law, p. 91.

[6] Le Droit Public Int. Maritime (Paris, 1886).

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refugees on a man-of-war as an act of extradition. Calvo, while saying that such a vessel is exempt from the civil and criminal jurisdiction, declares that the privilege cannot be invoked to cover acts contrary to the law of nations, such as attacks against the safety of the state or violence against individuals.[1] Sir Travers Twiss and Bar, both of whom deny the extraterritoriality of a diplomatic residence, hold that if fugitives be admitted on board of a man-of-war, they cannot be taken out by the local authorities by force, against the will of the commander. In the case of a man-of-war, Bar maintains that extraterritoriality is inherent in the thing itself,[2] and the same view is expressed by Twiss.[3] In support of this contention the latter cites, among other things, the opinion of Chief Justice Marshall in the case of the schooner *Exchange*,[4] an American vessel which was seized and condemned by the French government under the unlawful Rambouillet decree, and converted into a man-of-war called the *Balaou*. The vessel having subsequently come within the jurisdiction of the United States, the original owner brought suit to recover possession of his property. Marshall, delivering the opinion of the court, held that the action could not be maintained. He said that a public armed ship constituted a part of the military force of her nation, acted under the immediate command of her sovereign and was employed by him in national objects. That sovereign had many and powerful motives for preventing those objects from being defeated by the interference of a foreign state, and such interference could not take place without affecting his power and dignity. The implied license, therefore, under which a man-of-war entered a friendly port, might be construed as containing an exemption from the jurisdiction of the sovereign within whose territory she claimed the rights of hospitality; and nations had not in practice asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception. These statements seem to be most cogent

[1] § 1556. [2] Int. Law, § 154.
[3] Law of Nations, vol. i, § 165; *Law Magazine and Review*, 4th series, vol. i, p. 201.
[4] 7 Cranch, 117.

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as applied to the attempt to determine the title of the French government to a man-of-war in a civil action, but they do not import the absolute extraterritoriality of a public vessel. In the case of the *Santissima Trinidad*,[1] Mr. Justice Story cited the case of the *Exchange* as authority for the proposition that the exemption of public ships from the local jurisdiction was not an absolute right, but a rule of comity and convenience, arising from the presumed consent or license of nations, "that foreign ships coming into their ports and demeaning themselves according to law and in a friendly manner shall be exempt from the local jurisdiction." Attorney General Bradford in 1794 advised that a writ of *habeas corpus* might be awarded to bring up an American citizen unlawfully detained on a foreign ship of war.[2] In 1799 Attorney General Lee held that criminal and civil process might be served on a British man-of-war, though he laid special stress on a treaty stipulation then in force between the United States and Great Britain, "that the ships of war of each of the contracting parties shall at all times be hospitably received in the ports of the other, *their officers and crews paying due respect* to the laws and government of the country."[3] Attorney General Cushing accepted the doctrine of extraterritoriality.[4] On the other hand, Sir William Scott advised the British government that the authorities of a foreign country would not be chargeable with illegal violence if they employed force to take a fugitive out of a British man-of-war;[5] and it was held by the Geneva Tribunal in 1872 that as the privilege of extraterritoriality accorded to vessels of war had been admitted into the law of nations, not as an absolute right, "but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations," it could "never be appealed to for the protection of acts done in violation of neutrality."[6]

But, whatever may be said as to the extraterritoriality of ships of war, it is doubtless a universal custom to accord them

[1] 7 Wheaton, 283. [2] 1 Opinions, 47. [3] 1 *Ibid.* 87.
[4] 7 *Ibid.* 112; 8 *Ibid.* 73. [5] Halleck, note by Baker, vol. i, p. 176.
[6] Wharton's Int. Law Dig., § 36, vol. i, p. 139.

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a general exemption from the local jurisdiction;[1] and for the reason that such an exemption is accorded, it is held that considerations of propriety and good faith require the commanders of such ships to abstain from abusing the hospitality of the port in which they may be by making their vessels an asylum for offenders against the law. The question whether this rule should be applied to slaves has given rise to much discussion. On December 5, 1875, the British admiralty issued to the commanders of Her Majesty's ships of war the following instructions:

> Within the territorial waters of a foreign state, you are bound by the comity of nations, while maintaining the proper exemption of your ship from local jurisdiction, not to allow her to become a shelter for those who would be chargeable with a violation of the law of the place. If, therefore, while your ship is within the territorial waters of a state where slavery exists, a person professing or appearing to be a fugitive slave seeks admission into your ship, you will not admit him unless his life would be in manifest danger if he were not received on board. Should you, in order to save him from this danger, receive him, you ought not, after the danger is past, to permit him to continue on board; but you will not entertain any demand for his surrender or enter into any examination as to his status.[2]

The issuance of these instructions led to the appointment of a royal commission to consider whether the rules laid down abridged the rights of men-of-war. The commission differed as to the theory of extraterritoriality, which was maintained by Sir R. Phillimore, Mr. M. Bernard and Sir Henry Maine, and denied by Lord Chief Justice Cockburn, Mr. Justice Archibald, Mr. Thesiger, Q.C., Sir H. T. Holland, Mr. Fitz-James Stephen and Mr. Rothery. They all, however, concurred in a report that, whichever view prevailed, the fugitive should not be given up where the result of surrendering him would be to expose him to cruel usage.[3] By the treaty between the United

[1] Phillimore, Int. Law, vol. i, cccxliv.

[2] Brit. and For. State Papers, vol. lxvi, p. 892.

[3] Report of Royal Commission on Fugitive Slaves, 1876; Maine's Int. Law, p. 88; *Journal of Jurisprudence*, vol. xx, pp. 188, 414. Mr. Justice Stephen states that he joined in the report because he regarded it "as a proposal that the British nation should deliberately take in this matter the course which it regards as just and expe-

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States and Algiers of September 5, 1795, it was provided that if slaves of the Regency should make their escape to ships of war of the United States, they should immediately be returned.[1] By the treaty between those countries of 1816 it was provided that if Christians, captives in Algiers, should escape or take refuge on such ships, they should not be required back again.[2] The treaty between the United States and Tunis, of 1797, provided for the return of fugitive slaves by American men-of-war,[3] but the treaty of 1824 stipulated that slaves escaping or taking refuge on such vessels should be free. On the other hand, in the treaty with Madagascar of 1881, it is provided that Malagasy subjects shall not be permitted to embark on United States vessels without a passport from the native government,[4] and the institution of slavery in that country is explicitly recognized.[5]

During the disorders at Naples in 1849, Lord Palmerston said that while it "would not be right to receive and harbor on board of a British ship of war any person flying from justice on a criminal charge or who was escaping from the sentence of a court of law," yet a British man-of-war had always been regarded as a safe place of refuge for persons fleeing "from persecution on account of their conduct or opinions," whether the refugee "was escaping from the arbitrary acts of a monarchical government or from the lawless violence of a revolutionary committee."[6] In August of the preceding year the Duke of Parma, whose life was threatened, was embarked at Civita Vecchia on the British man-of-war *Hecaté*,[7] and in the same

dient, although it is opposed to international law as it stands, and aims at its improvement." He maintains that the fundamental principles of international law, when consistently applied, require the commanding officers of ships of war in foreign territorial waters "to refuse protection in all cases whatever to those who break the local law, and to deliver up, on a lawful demand, political refugees, the victims of religious persecution, and slaves who have received or expect from their owners the treatment which a vicious brute would experience from a cruel master." History of the Criminal Law, vol. ii, p. 57.

[1] Art. xi. [2] Art. xiv. [3] Art. vi. [4] Art. vii, par. 2.

[5] Art. iii. Stipulations specifically applicable to fugitive slaves are not infrequently found in treaties. Report of Royal Commission on Fugitive Slaves, 1876.

[6] Br. and For. State Papers, vol. l, p. 803.

[7] *Ibid.* vol. xli, p. 1316.

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month the British admiral ordered H. M. S. *Bulldog* to the same port to receive the Pope, should commotions render it desirable for His Holiness to seek refuge on board.[1] During the revolution in Greece in 1862, King Otho and his queen were afforded protection on the British frigate *Scylla*,[2] while a member of the cabinet and his family were received on the *Queen*, and several persons were sheltered on the French man-of-war *Zénobie*. The instructions given by Vice-Admiral Sir William Martin on that occasion to the commanders of British ships of war declared that their duty was "limited to the protection of the lives and property of British subjects and to affording protection to any refugees whom you may be informed by Her Majesty's minister would be in danger of their lives without such protection."[3] Under these instructions, the reception of refugees by the British commanders was carefully restricted.[4]

In April, 1831, Captain Sloat, of the United States man-of-war *St. Louis*, afforded temporary shelter from mob violence to the Vice-President of Peru and General Miller, with the concurrence of the government of Peru and with the understanding that they should not remain on board longer than was necessary for their protection from such violence.[5] In 1862, while the city of New Orleans was occupied by the forces of the United States, three Spanish men-of-war then in that port received on board a large number of passengers for Cuba, among whom were many citizens of the United States who, under the orders then in force, were not permitted to leave the city without passes. General Butler, the officer in command, claimed the right to search the vessels "for criminals other than rebels," and after much difficulty he obtained the privilege of searching two of the ships. In consequence of this occurrence, he prohibited the entry of Spanish men-of-war above the forts, till further orders from the War Department. Mr. Seward, while recommending to the Secretary of War the suspension of the prohibition pending ex-

[1] Br. and For. State Papers, vol. xli, p. 1324.
[2] *Ibid.* vol. lviii, p. 1034.
[3] *Ibid.* p. 1057.
[4] *Ibid.* p. 1087.
[5] House Ex. Doc. 272, 22d Cong., 1st sess. See also this QUARTERLY for March, 1892, p. 37.

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planations from the Spanish government, made urgent representations to the Spanish minister. The Spanish government, after considering the subject, defended the action of its naval officers, on the ground that asylum at least for political offenders might be granted on men-of-war. Mr. Seward refused to concede this claim, saying that the United States adhered to its former declaration that no ship of war of any nation would be expected to carry into or out from any port of the United States which was either occupied by their forces or in the possession of the insurgents, any person who did not actually belong to the civil, military or naval service of the country whose flag the vessel carried, and especially that ships of war should not, without express leave of the military authorities, carry into or out of such ports any citizen of the United States. It was only, said Mr. Seward, on an expected compliance with these terms that any foreign ship of war could enter a port in military occupation during the civil war.[1]

During the war in Paraguay in 1866, Mr. Washburn, minister of the United States at Asuncion, suggested to Commander Crosby of the United States man-of-war *Shamokin*, then in Paraguayan waters, that peace might sooner take place if "a certain distinguished person in Paraguay," meaning President Lopez, could find a safe means of escape from the country on that vessel. Commander Crosby replied that he could exercise no discretion in the matter, since the admiral had given him positive orders not to bring away President Lopez or any other Paraguayan. When Mr. Washburn brought the subject to the attention of his government, with an intimation that he himself should be invested with discretion in the case, Mr. Seward answered as follows:

> The President sanctions the direction given by Admiral Godon to Commander Crosby. . . . This government owes it to the belligerents, as well as to its own dignity, to abstain from everything which could be or even appear to be a departure from neutrality in the unhappy contest which is now going on between Paraguay and her allied enemies.

[1] Dip. Cor. 1863, part ii, p. 915.

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You will be expected to conform your proceedings rigidly to the principle of non-interference.[1]

During the civil war in Chili in 1891, the Secretary of the Navy of the United States gave, in respect to the reception of refugees, the following instructions:

In reference to the granting of asylum, your ships will not, of course, be made a refuge for criminals. In the case of persons other than criminals, they will afford shelter wherever it may be needed, to Americans first of all, and to others, including political refugees, as far as the claims of humanity may require and the service upon which you are engaged will permit.

The obligation to receive political refugees and to afford them an asylum is, in general, one of pure humanity. It should not be continued beyond the urgent necessities of the situation, and should in no case become the means whereby the plans of contending factions or their leaders are facilitated. You are not to invite or encourage such refugees to come on board your ship, but, should they apply to you, your action will be governed by considerations of humanity and the exigencies of the service upon which you are engaged. When, however, a political refugee has embarked, in the territory of a third power, on board an American ship as a passenger for purposes of innocent transit, and it appears upon the entry of such ship into the territorial waters that his life is in danger, it is your duty to extend to him an offer of asylum.[2]

These instructions seem to have been very liberally construed. During the disorders immediately following the downfall of Balmaceda, the British ships refused to receive any refugees. The French ships, which lay far out from the shore, did not

[1] Dip. Cor. 1866, part ii, pp. 611–612; 1867, part ii, p. 705. In November, 1865, a sailor belonging to the United States man-of-war *James Adger*, who was watching some stores belonging to the ship on one of the piers at Aspinwall (Colon), in Colombia, killed a British subject named Holmes, who was trespassing on the pier. The consul of the United States, to whom the local authorities applied to secure the surrender of the sailor, refused to intervene for that purpose, and he was carried away. Mr. Seward, replying to the representations of the Colombian minister, said that the United States did not sanction the omission to give the mariner up for trial, and that, if the case had been seasonably made known, an order for his delivery would have been issued, if it could have been done properly under the circumstances. Dip. Cor. 1866, part iii, pp. 596–597; part i, pp. 215–218; Dip. Cor. 1867, part ii, p. 818.

[2] House Ex. Doc. 91, 52d Cong. 1st sess., p. 245.

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receive any. The Balmacedist President-elect, Vicuña, and Admiral Viel, found refuge on the German man-of-war *Leipzig*. On September 4 the United States man-of-war *Baltimore* sailed for Peru with nineteen refugees, part of whom had been sheltered by her and the rest by the flagship *San Francisco*. The latter ship, just before her departure from Valparaiso on September 14, when, as Admiral Brown, the admiral in command, has said, "both at Santiago and Valparaiso perfect order existed," received other refugees. When he arrived at Callao on the 20th, he wrote that he had brought two prominent "refugees," but their names were not given. The report was subsequently published that the two "mysterious refugees" were Señor Ovalle Vicuña and Colonel Vidaurre, members of a Balmacedist military court — Vidaurre being its president — which on August 19 condemned to death on a charge of conspiracy a number of youths whose ages ranged from sixteen to eighteen years.[1] The boys were subsequently shot in cold blood and their bodies mutilated.[2] On October 4 the *Herald* correspondent telegraphed from Valparaiso that the expected return of the *San Francisco* was regarded in Chili "with undisguised disfavor." Admiral Brown himself telegraphed from Callao on the 11th of that month that, "taking into account the strong feeling in Chili against the American squadron," he doubted "if an increased naval force at Valparaiso would improve the state of affairs." That the extensive deportation of refugees by the American men-of-war partly accounted for that feeling is obvious.

2. *Merchant Vessels.*

Apart from acts affecting their internal order and discipline and not disturbing the peace of the port, merchant vessels as a rule enjoy no exemption from the local jurisdiction and there-

[1] The new government had been recognized by the United States a week previously. There does not seem to have been any excuse for the reception of these refugees, the country being absolutely quiet and the government thoroughly established and recognized by foreign powers.

[2] N. Y. *Herald*, September 25, 1891. The execution of these boys is also reported by Mr. Egan. He states that they had gone out as *monteneros*, or guerillas.

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fore cannot assert a claim to grant asylum.[1] It has been suggested that a fugitive offender who comes on a vessel within the territorial limits of a nation, as a passenger in transit from one foreign country to another, should not be seized.[2] Such an exception, however, cannot be said to be sanctioned by publicists, nor am I aware that it has been admitted in practice unless in particular places where a wide exemption from the local jurisdiction has been accorded to merchant vessels, or to a special class of such vessels. In Cuba merchant vessels have enjoyed very considerable immunities. In 1880 one Leopoldo Olivella, who was accused of murder at Matanzas, took passage on an American steamer in the city of New York for Vera Cruz in Mexico, Havana being a regular port of call. When the steamer arrived at Havana, the consul general of the United States, to whom the authorities had applied for the surrender of the fugitive, went aboard, followed by the chiefs of police of Havana and Matanzas, who were armed with a warrant of arrest and accompanied by witnesses to the fugitive's identity. Olivella consented, however, to go ashore, stipulating that legal steps should be taken by the superior authorities of the island "to demand his extradition from the government of the United States." A certificate of the proceeding, embracing this stipulation, was drawn up, and was signed by the accused and the several officers present; and the Spanish minister subsequently presented it to the Department of State, with the evidence in the case, as well as the indictment and warrant of arrest, in order that the United States might be "fully satisfied with the formalities which have been observed in the matter of the arrest of Olivella."[3] In 1884 one Nuñez, who had taken part in an insurrection near Sagua, escaped to the United States, where he declared his intention to become a citizen. Soon thereafter he returned to Sagua as one of the crew of an American vessel, remaining on board while in port. The chief of

[1] Whart. Int. Law Dig., vol. i, §§ 35, 35a; De Cussy, Phases et Causes Célèbres, vol. i, p. 87; Journal du Droit Int. Privé, 1890, p. 643; Alex. Porter Morse, in *Albany Law Journal*, Nov. 1, 1890.

[2] Ortolan, Diplomatie de la Mer, vol i., p. 304.

[3] For. Rel. 1890, p. 135.

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police having applied to the acting consul of the United States for authority to take Nuñez from the vessel, the acting consul sought the instructions of the consul general at Havana, who directed him to authorize the arrest, if the offence was not political. On the presentation of evidence by the authorities that Nuñez was accused as an assassin, a robber and a bandit, the acting consul gave his written consent to the arrest. Nuñez was accordingly arrested, but he was afterward released on the discovery that he had been amnestied by the governor of the province and permitted to leave the island after the proceedings on the various charges against him were begun.[1] In July, 1889, one Peter Lynch, a sailor on the British steamer *Charles Morand*, killed the first officer while the steamer was lying in the port of Manzanillo. The Cuban authorities declined to take jurisdiction of the offence. After leaving Manzanillo, the steamer entered the port of New York, where Lynch was held in extradition proceedings which resulted in an order for his surrender for trial in England.[2]

The vessels of the Pacific Mail Steamship Company, an American line plying between San Francisco and Panama as terminal points, and calling at various Central American ports, have generally been free from molestation in those ports in respect of passengers concerned in political agitations in the Central American states. In 1884 Señor Cruz, then minister for foreign affairs of Guatemala, made an oral application to Mr. H. Remsen Whitehouse, the consul general of the United States, with a view to his concurrence in the detention of two men, named Huerte and Sandoval, who were alleged to have participated in a then recent insurrection on the Mexican frontier, and who were passengers in transit on the Pacific Mail steamer *Clyde*, then lying in the port of San José. Mr. Whitehouse replied in writing that he did not consider himself authorized to act in the matter, and the men were not detained.[3] In 1890, however, Mr. Mizner, then minister of the United States

[1] For. Rel. 1890, p. 136. [2] *Ibid.* p. 134.

[3] For a reference to this and similar cases, see For. Rel, 1890, p. 137; *ibid.* 1885, p. 88; *ibid.* 1875, p. 139.

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to the Central American states, authorized the seizure of General Barrundia, who was a passenger on the Pacific Mail steamer *Acapulco*, from Acapulco, in Mexico, to Panama, and who had been engaged in an attempt to stir up an insurrection in Guatemala. The seizure was attempted at San José, Guatemala, and Barrundia, while resisting arrest, was killed. Mr. Mizner's conduct was disavowed, and he was recalled. The President, in his annual message to Congress, 1890, stated the grounds of Mr. Mizner's recall as follows:

> It being evident that the minister, Mr. Mizner, had exceeded the bounds of his authority in intervening, in compliance with the demands of the Guatemalan authorities, to authorize and effect, in violation of precedent, the seizure on a vessel of the United States of a passenger in transit charged with political offences, in order that he might be tried for such offences under what was described as martial law, I was constrained to disavow Mr. Mizner's act and recall him from his post.

This statement is in line with the telegraphic despatch sent to Mr. Mizner when he first reported the case. That despatch was to the effect that,

> as General Barrundia entered the jurisdiction of Guatemala at his own risk, the assumption of jurisdiction by the Guatemalan authorities was at their risk and responsibility, and that it was regretted you have [*sic*] advised or consented to the surrender, as no specific charge of violation of the ordinary law of Guatemala appeared and the treatment of General Barrundia as an enemy under martial law was alone alleged.

These statements seem to be far from containing an assertion of a right of asylum. It appears that when the Guatemalan authorities went on board of the *Acapulco* to seize Barrundia, they read Mr. Mizner's letter authorizing that step, as their warrant; and it was for "intervening" "to authorize and effect" the seizure, that Mr. Mizner was recalled.

In 1885 a Haytian insurrectionist, named Laroche, secretly went on board of a French barque, the *Panama*, at Cape Haytian. The local authorities asked permission of the French vice-consul to go on board and arrest him. The vice-consul applied for instructions to the French minister, who refused to

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grant such permission, and the *Panama* was allowed to sail with Laroche on board.[1] When this case was reported to the government of the United States, Mr. Bayard, then Secretary of State, though not asserting any claim of asylum, said:

> As we understand the case of the *Panama*, the local authorities applied to the consul for permission to go on board and take the fugitive. In a case which recently arose in Cuba, where application was made to a consul to order the delivery of a person then on board an American vessel in port, who was accused of common crimes, and where the consul, after examining the charge against the person, ordered the captain to deliver him up, the department held that the consul had no authority to order such surrender.[2]

On December 10, 1873, the Brazilian mail steamer *Cuyaba*, commanded by an honorary lieutenant in the Brazilian navy, and subsidized by the imperial government for the transportation of its correspondence from the province of Matto Grosso and its legation in Paraguay, arrived at Buenos Ayres, in the Argentine Republic, on a voyage from Asuncion to Rio. On board was one Rivarola, a native of the Argentine Republic and formerly in its military service, who had afterwards entered the army of Paraguay. He had embarked on the *Cuyaba* at Asuncion with his Paraguayan commission and a permit to leave the country, and his passage was paid to Montevideo by the Paraguayan government. Shortly after the arrival of the steamer at Buenos Ayres, an officer of the port went on board and demanded that he be allowed to arrest Rivarola as a political offender. In consequence of the refusal of the captain to acquiesce, the steamer was detained, and the Brazilian minister was informed that the *Cuyaba* could not leave the port unless Rivarola was surrendered. The Brazilian minister protested against the detention of the steamer, and the Argentine authorities "as a matter of courtesy" permitted her to proceed, laying special stress, just as the Brazilian minister had done, on the fact that Rivarola was in the service of the Paraguayan government and that the steamer was transporting correspondence of the Brazilian government. The latter government subsequently

[1] For. Rel. 1885, p. 539.

[2] *Ibid.* 1886, p. 530.

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proposed that the treatment of vessels in transit should be regulated by agreement, in order to avoid the possibility of conflicts — a proposition in which the Argentine government concurred.[1] A precedent for such a negotiation might have been found in the postal convention between France and Great Britain of September 24, 1856, by which it is provided that "vessels chartered or subsidized by government," when employed in the service regulated by the treaty, shall be "considered and treated as vessels of war," and that passengers admitted on board such vessels, who do not think fit to land, shall not under any pretext be removed from on board, be liable to any search or be subjected to the formality of a visa of their passports.[2] These stipulations illustrate the possibility as well as the expediency of endeavoring to provide for exceptional cases by positive agreement, in order that vexed questions may be avoided.

JOHN BASSETT MOORE.

[1] Memoria de Relaciones Exteriores, 1874, Buenos Ayres. The right of asylum in merchant vessels was explicitly denied in Brazil in the later case of the *Rio Apa*. Seijas, Derecho Internacional Hispano-Americano, vol. i, p. 141.

[2] Hertslet's Treaties, vol. x, p. 108. A similar provision was in the earlier convention of April 3, 1843; *ibid.* vol. vi, p. 349.

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THE UTILITY OF SPECULATION IN MODERN COMMERCE.

IT has been the farmer in the United States who has cried the loudest against speculative dealings in agricultural staples. His protest was heard most shrilly in 1890 and 1891, years of relatively low prices for farm produce, but with the return of "better times" in the great grain-growing states, his demand for legislative suppression of dealings in futures was a little less pronounced. Within the past few years, however, a portion of the press, as well as certain politicians and other public men, have been manifesting a very tender interest in the farmer — much such an interest as was previously shown for the workingman in our manufacturing industries. It is now the agriculturist who is to be convinced that this or that political party is best suited to become his economic Moses. As a result of this interest merchants and speculators two years ago were obliged to institute an educational campaign at Washington to defeat an economic monstrosity known as the Butterworth Bill, and more recently they have been engaged in a like public service in connection with the Hatch and Washburn Bills. The projects embodied in these bills are an outgrowth of (1) ignorance of the place and function of organized speculation; (2) misinformation with respect to legitimate speculation and its operation; and (3) demagogism pure and simple: and the measures have been fostered by those who regard trades in "futures" of wheat, cotton and other staples as "gambling," and the operators as dealers only in "wind" products. The primary object of all these bills is to prevent any one from contracting to deliver at a future date that which he does not possess at the date of making the contract.

The history of commerce contains numerous instances of fruitless assaults on "speculation." A Dutch law, as long ago as 1610, fifty-four years before the panic which visited Amsterdam in 1764, forbade the sale of securities not possessed by the

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seller at the time of the sale. An English law of 1697 declared transactions for delivery more than three days ahead to be illegal. "Options" in English government securities were prohibited in 1834, and as late as in 1867 an act was passed by Parliament prohibiting "bear" or "short" sales of bank shares. Both these acts were directed against selling securities prior to acquiring them — a practice which it was thought had unfavorably affected the national credit. In England and in Germany the gambling act, it is said, can still be pleaded by unfortunate "short-sellers," but the act is inapplicable to any transaction by duly authorized agents at the London Stock Exchange. Selling gold "short" was forbidden by act of Congress in the United States twenty-eight years ago, but the act was promptly repealed,[1] owing to its unfortunate and unexpected effects. Operations "for the account" in public funds and railway shares were declared illegal in Prussia in 1836, in 1840 and in 1844, but the acts were repealed in 1860.

When it is recalled that during the past two centuries leading nations have been visited with commercial crises or financial panics at intervals on the average of about twenty years, entirely irrespective of such laws as the foregoing and irrespective of organized speculation, it must be inferred either that such laws were useless *ab initio* or that some counter-influence prevented their successful operation. In the absence of data justifying the latter alternative, the conclusion is inevitable, and is corroborated by the frequent repeals of such laws, that they have not met the expectations of their advocates. On the other hand, the history of commerce warrants the belief that were all laws repealed which seek to restrict the freedom of contract and were encouragement offered to organized speculative markets, the "short-seller," or "bear," would be found to be the safety-valve in the machinery of investment and speculation, — a check upon investment and a regulator of price-movement to an extent which the general public have not yet learned fully to appreciate.

[1] The original act was approved June 17, 1864; the repealing act, July 2, 1864, just fifteen days later.

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The "investor," in any commercial or industrial line, may be compared with a "bull operator" who expects and intends to profit by reason of making the property productive; that is, a bull operator may be an investor, and *vice versa*. The speculator who is not an investor (nor a "bear") is one who makes a purchase in the expectation of profiting from an increase in the value of the property rather than through its being made productive. Speculation at organized commercial exchanges, such as the Chicago Board of Trade or the New York Produce Exchange, consists in transactions by the so-called bull and the "bear," or "short-seller." The former buys, or contracts to buy, (say) wheat, on any day within the current or some future month on which the seller (generally) may elect to deliver the same; that is, at the seller's "option" as to the particular day within the month. This form of trading has thereby come to be known as dealing in "options," though "futures" is a more appropriate term. Contracts covering trading of this variety, whether in wheat, corn, oats, cotton, pork, bacon, lard or petroleum, involve in every instance the actual delivery of the property sold and the acceptance of and payment for the same by the purchaser; and the default of the seller to deliver or of the buyer to accept and pay for the property renders the one so defaulting liable for breach of contract. When the appellation "gamblers" is applied to those who deal in this manner, it may express the private view of the person using the term; but in law and in fact such transactions do not constitute gambling.

In a little volume entitled *Futures*, by Julius Aroni, of New Orleans, there is reference to a very instructive case, Brown *vs.* Speyers, 20 Grattan 296, decided in 1871. The plaintiff, a gold broker in the city of New York, was employed by the defendant, residing in the city of Richmond, to buy and sell gold on commission for him in the city of New York. The transactions proved unfortunate, resulting in a loss to the defendant of about $4000, which plaintiff paid, and to recover which he instituted this action. The defendant insisted that the agreement between him and the plaintiff, his broker, was

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wagering, and also that the sales and purchases made by the plaintiff were void. The learned judge who delivered the opinion of the court said:

"It is objected, however, that the contract which is the foundation of the action is a mere wager and void as such, under the provisions of the Virginia statutes. I cannot perceive the force of this objection. By the very terms of the arrangement the defendant in error, in buying and selling the gold, could sustain no loss, nor realize any profit from the transaction beyond his commissions, to which he was entitled in any event. Whatever might happen, no damage or benefit could accrue to him from the venture. If any profit resulted from the speculation, it belonged to the plaintiff in error. If any loss accrued, he was to bear it. And I have yet to see a case in which it has been held that a contract is a wager by the terms of which the loss and profit were all on one side. Another point relied upon in the argument is that no sales or purchases of gold were in fact made, and the subject-matter of such pretended purchases and sales had at the time no existence actual or potential and therefore, according to a well-established principle of the law of sales, the contract in relation thereto was void in law.

But the judge proceeds to say that the question could only arise between the vendor and the vendee and could not affect the rights of the plaintiff, who had simply acted as the agent of defendant in the case then before the court.

In order to make plain other points involved in the question of the legality or illegality of speculative contracts, one more decision may be referred to, that by Judge Bunn, of Wisconsin, in the case of Clark *vs.* Foss, reported in 7 Bissell 540, and summarized as follows in the work referred to above:

1. A contract for the delivery at a future time of personal property which the seller has not on hand when the contract is made, nor any means of getting it, is not void for illegality;

2. The secret intention of one of the contracting parties not to fulfil his contract, uncommunicated to the other, is not enough to make the transaction illegal;

3. The intent that such a transaction should be a mere betting on the market, without any expectation of actual performance, must be mutual and constitute an integral part of the contract, in order to render it invalid;

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4. If the contracts were valid in their inception and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties by payment of differences instead of by actual delivery cannot make them void for illegality.

I have been at some pains to quote from legal decisions covering the several varieties of contract recognized by the commercial exchanges, even those settled by payment of differences, because there is such a wide-spread ignorance of the fact that the highest courts of the various states and of the United States have time and again certified to their legitimacy and legality. Even the statistician of the Agricultural Department goes so far as to intimate in an official publication that speculation at the Chicago Board of Trade, the New York Produce Exchange and like bodies is something apart from legitimate business. And the same view is entertained by the gentlemen whose names are used to designate the bills touching the subject, as well as by many other persons in official life. Following in the train of these gentlemen are thousands of other good people who appear to be pestered with such reasoning as the following:

Because it is easy to offer and agree to sell that which one has not;

Therefore, there is naturally a predominance of sellers in speculative markets:

And, as free offers to sell tend to lower prices;

Therefore, the existence of this freedom of short selling has the effect of "unduly depressing" prices.

And then follows the easy conclusion that the farmer is "robbed" of a portion of his just dues by bear speculators.

As a matter of fact the seller-short is consciously or otherwise a friend of the public, farmer as well as general consumer; for without him both would suffer from excessive fluctuation in prices far more than at present. The difficulty in getting the public to understand this is largely due to the intricacy of the mechanism of speculation, which is not generally understood — particularly the phenomena of selling short. Even so learned a body as the House committee which recently reported in favor of the passage of a substitute Anti-Options

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Bill went so far as to quote from a number of newspaper reports of the wheat market to show, apparently, that short-selling "unduly depressed" prices. The main reliance was on such statements as the following:

> The market broke sharply under the pressure of short-selling.
>
> The Chicago bear ring has finally succeeded in creating a panic throughout the world.
>
> All the energies of the trade have been directed to breaking down the price of wheat.
>
> Pardridge, who has been so successful on the bear side. . . .
>
> Pardridge said . . . he had made four times as much out of his bear campaign, [*etc.*]
>
> The man who is just now dominating the markets.
>
> The milling and shipping demand was about sufficient to absorb current offerings, . . . yet the price [of cash or spot wheat] followed the price of futures down.
>
> [Quoted from an individual trader:] It is apparent that the operations of one big bear like Pardridge are more influential than low prices and the fear of crop danger.

The "manipulations" referred to in the foregoing were characterized by the House committee as "flagrant and destructive of the interests of the producer." In reply it only needs to be said that if Mr. Pardridge or any other short-seller had been wrong in his views as to the world's supply and demand of wheat, on which the price must in the long run depend, Mr. Pardridge, or whoever he might be, would have been unable to make good his contracts except at a loss, and so would have cornered himself and probably suffered bankruptcy. The success of the speculator named was directly dependent upon his contracting in the winter months of 1891–92 to deliver millions of bushels of wheat in the spring months of 1892 at prices which seemed disproportionately low to those who believed in a nominal shortage in the world's supply, — and they were about ninety-nine out of every hundred who had opinions to offer. He stood by that conclusion, the supply of wheat proved more than ample and he made money, while the general public enjoyed cheaper flour sooner than it would have secured it without his assistance. He has proved, so far as the cereal year 1891–92 is concerned,

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that he was correct; and whether his actions were due to special information, intuition or accident, he was the first to demonstrate that there was in existence somewhere more wheat to meet the demands of importing countries than any official or unofficial bureau of information had been able to discover. When he sold wheat late last winter for May delivery at eighty cents, a price absurdly low in the general estimation, he was not unduly depressing the price. He was putting quotations for May *where they should have been.* Of course, he may not have known, as he now does, that he was absolutely right, though he expressed that view from first to last. Had he been unduly depressing the price, the outcome would have been different. He would long ago have found the world's demand for wheat so great that his so-called "wind" wheat sales would not have been able to "force prices down"; he would have been obliged to "run to cover," to pay a very high price for wheat to make good his deliveries, and would have been so anxious to get the grain that the price would not only have rapidly advanced, but in all probability would have been inflated temporarily to a point above the actual value.

Had there been no facilities for organized speculation in foodstuffs last winter, in the presence of the prevalent misinterpretation of the supply of wheat, with only the milling, shipping or exporting demand to influence prices, as in the "olden days," quotations would have been excessively inflated,—doubtless much to the delight of the farmer, but to the severe cost of the unconsidered but more numerous general consumer. As a matter of fact, Mr. Pardridge, or, if you please, the "bear crowd," put the price of wheat where it belonged, from the point of view of its statistical situation; they did that which neither the national Agricultural Department, the Vienna Congress, *Bradstreet's*, the Cincinnati *Price Current*, Beerbohm's or Dornbusch's (London) *Lists*, or any other of the governmental and private statistical bureaus of the world had been able to do: they proved the existence of unsuspected and relatively abundant supplies. If, by reason of supplies being shorter than they really were, the short-sellers had not succeeded, they would have

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bankrupted themselves, but at no cost to any one else; and the price of wheat for a time would have gone somewhat higher than the normal, thus affording those who had suffered from undue depression — the bulls — an opportunity to prove that they were right and incidentally to recoup their losses.

The foregoing indicates, among other things, that much of the current comment in daily market reports is misleading to the average reader; it certainly was to the House committee which had the Anti-Options Bill under consideration. These estimable gentlemen took too literally the remarks as to what tended to "unduly depress" prices, the incident forming a sufficient comment on the lack of information concerning the function and influence of speculation among some of those whose business it is to record its movements.

The end of speculation in the great staple corps, the production of which cannot be artificially regulated so that it will exactly satisfy the world's demand, is to furnish:

(1) A continuous open market;

(2) A measure (the best sense of the commercial world) as to the value of products from day to day; and

(3) The machinery for carrying surplus crops from prolific to lean seasons.

By securing these ends, and by the creation of standard or contract grades, speculation renders the staple product a better security at lower rates of interest on which to obtain loans at all times; and by minimizing the cost of carrying surpluses from month to month or from season to season, it enables the producer to sell to the best advantage.

Without organized speculation as it now exists at Chicago, New York, Minneapolis, St. Louis, Toledo and elsewhere (abroad as well as at home) we should have to return to the old-time practices by which the enterprising or "sharp" individual profited more relatively than he does to-day at the expense of one less experienced or well-informed; the comparatively few millers and exporters would have the thousands upon thousands of producers or holders at their mercy; the price of wheat would become local instead of being based at all points on its value in

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the world's markets; in the absence of a continuous open market bankers would not lend on grain readily or at as reasonable rates as they now do, and the carrying over of surplus crops from one season to the next would result in undue profits and excessive losses.

Organized speculation in grain (as in other agricultural products) is a part of the modern machinery of trade — as real and essential a part as is the locomotive, the steamship or the telegraph. When the time arrives that the output of a staple manufactured article is enormously in excess of demand in some countries and has to be carried over, to an extent, to meet foreign demand, organized speculation in manufactured products may become successful — but not until then. We have seen an illustration of this in speculation in Scotch pig-iron warrants. As manufactured products may be produced practically irrespective of climate, drouths, rains, character of the soil, *etc.*, and, within certain limits, irrespective of the points where the raw materials are produced, it follows that demand for and supply of such products may ultimately be adjusted. There is thus a far greater need for the machinery of speculation in agricultural than in manufactured staples.

Trading in futures has been evolved by the necessities of modern commerce, and if checked here it will be carried on abroad. No one community can permanently prevent the employment of so essential a piece of commercial machinery, and the attempt to do so may be likened to efforts which have been made to check the use of labor-saving devices.

The selling for future delivery what one does not possess at the time of sale, has always been and is everywhere to-day a part of commercial life. Men contract to supply a new building when the materials of which it is to be built are not in existence; the retail dealer buys goods which he merely expects and hopes to be able to sell again; jobbers and importers "go short" every day by selling that which they do not possess, but which they fully expect to be able to obtain at a time and at a price which will enable them to make the delivery at a profit. The mill owner, too, buys futures of cotton, and sells futures of cloth

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to the jobber and of prints to the commission merchant. Could the latter pay the cotton planter his (the planter's) share for the cotton in the cloth, and the mill owner his share for manipulating the fibre, that would constitute the "ringing out" process, which so many have failed to understand and have decried as gambling. Coal dealers buy and sell futures of coal on the basis of an estimate of probable sales; and jobbers, who dispose of goods "by catalogue," are short-sellers of the most pronounced type.

The claim (by the Minneapolis *Tribune*, June 28, 1891) that there is no need for short sales, completely loses sight of the fact that they are our only salvation from an unwarranted inflation of prices. It was the bears who sold so freely in advance of their holdings to Mr. James R. Keene, and broke his "corner" at Chicago some years ago by proving that there was more wheat in the country than Mr. Keene had suspected; by doing so they brought prices back to the normal long before they could have gotten there without such aid. For that matter, were it not for the bears, the Keene corner would have been successful. But short sales do not always result in putting prices down. The bears often advance prices against their wishes by having to buy to protect themselves, as Mr. Pardridge would have had to do, had he been wrong and the rest of us right as to the world's wheat supply and demand this year. If, as has been declared, the "shorts" depress prices unduly, supplies would leave for some other of the world's markets, the price being ultimately determined by supply and demand.

The insurance against excessive loss on purchases of futures of wheat by sales of like quantities for future delivery has grown to enormous proportions both here and abroad and constitutes a feature of speculative dealings in grain long since recognized as a necessity. A Liverpool merchant orders a cargo of wheat from San Francisco; it is purchased and shipped and will arrive out some months hence. Meanwhile he sells by cable at New York, for instance, a like quantity for delivery in the month in which his wheat is due to arrive at Liverpool. Should the price of wheat decline while his San

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Francisco cargo is *en voyage*, he buys in enough wheat at New York to make good his delivery there and the profit at New York offsets a loss due to the decrease in price of the wheat which arrived at Liverpool. Like transactions in insurance are made by millers, shippers and others throughout this country. As the Minneapolis *Market Record* pointed out October 20, 1891:

> This trading . . . is chiefly based on sales against country purchases on the one side and purchases against flour sales on the other. . . . Before this business was organized (at Minneapolis) the trading was all in outside places. It had to be done somewhere, for no elevator company would dare to pile up millions of bushels of wheat in country houses or terminal houses even, unprotected by sales for forward months. They would find it difficult to maintain a standing in financial circles without such provision for safety against possible changes in values. The business done in grain for forward months has a strengthening influence upon the prices paid for grain in the country, as it removes risk and allows buyers at country stations to figure up closely, not having to provide for what would otherwise be a fruitful source of loss. It is not a mistake to say that half the old-time margin, at least, has been wiped out since the change in methods.

The successful speculator must have accurate knowledge from every available source. Being successful, he has merely foreseen causes which made prices go up or down, though his operations may have tended to make prices rise or fall more rapidly than they would otherwise have done; for should he operate counter to underlying and omnipotent price-making influences, he pays the cost himself. His work, therefore, merely quickens and emphasizes the laws of trade, in discounting the future price of an article based upon prospective commercial conditions.

There is, of course, another variety of "speculator,"—he who cares little and knows less about supply and demand or stocks or prices or exports; he spends his time buying when the real speculator buys and selling when the latter sells. But he does not count for much; he cannot well be obliterated, but he does no harm except to himself.

The farmer should not forget that speculation gives a present value to commodities when the market is stagnant—when the

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agriculturist would otherwise find his produce unsalable at any price; and the merchant may as well have it called to his attention that speculation helps business generally by reason of the connection between the latter and the activity stimulated by it in certain commodities.

The excess of speculators, who are bound to work to the common welfare or pay a fine to the amount of their investments or contracts, serves merely to emphasize the operation of speculative transactions to the various ends described; and a speculative demand with the short-selling safety valve is thus created, which is sufficient to absorb the surplus yields of wheat, cotton, corn or oats, and to carry them until wanted and place them where most needed at the lowest prices consistent with the world's supply and demand.

In this age of highly developed business activity, the world's real speculators are the Arkwrights, the Frémonts, the Stanleys and the Edisons of trade, with the added qualities of those whose brains, resources and energy have utilized the discoveries of these vanguardsmen.

ALBERT CLARK STEVENS.

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USURY IN LAW, IN PRACTICE AND IN PSYCHOLOGY.

THAT a borrower may by his "necessities" be forced into making a burdensome contract, has been the opinion of many supreme court judges, expressed in their decisions, and is a fundamental conviction among legislators and men in general who favor usury laws. It is assumed that borrowing is a natural and often a necessary act, in which the borrower may be forced to agree to hard conditions imposed by the greed of the lender; that upon it in some degree depend the maintenance and development of industry; that through it men are enabled to avoid losses and sacrifices; and, by implication, that the possessor of loan wealth, while holding power over the poor and the unfortunate, is at the same time under some sort of obligation to lend to them. There is a feeling, rather than a distinct belief, that the borrower lacks the conditions that would enable him to deal on equal terms with the lender; and the latter's greater freedom of choice between contracting and not contracting has been forcibly called a "moral duress" by the supreme court of New Hampshire.[1] No one can study interest from a legal point of view without realizing that its fundamental phenomena are of a psychological character, but qualified by economic influences. This is brought out prominently in a study of usury, and it is proposed in this article to sketch the chief attempts that have been made in this country to regulate the rate of interest by law and the presumption as to their effect, with an examination of the psychological side of the subject.

I. *Past and Present Usury Laws.*

Nine states and territories have never had a usury law except the United States law governing national banks. These nine

[1] Peterborough Savings Bank *vs.* Hodgdon, 62 N. H. 300 (1882).

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all lie in the far West, and are by name Alaska, Arizona, California, Colorado, Montana, Nevada, Utah, Washington and Wyoming.[1] Three New England states, after experience with usury laws, have repealed them, Connecticut in 1877, Maine in 1870 and Rhode Island in 1865. In two states, Louisiana and Massachusetts, the statutes on the subject have been so qualified as to be practically insignificant; the former state substantially abandoned usury laws in 1860 and the latter in 1867.[2]

In eighteen states and territories that now have usury laws there have been intervals since the first enactment on the subject during which such laws were not in force. These periods are as follows: Alabama, 1818 to 1819; Arkansas, 1868 to 1874; Florida, 1822 to 1830 and 1866 to 1891; Georgia, 1873 to 1875; Idaho, 1864 to 1879; Illinois, 1819 to 1833; Indiana, 1831 to 1833; Kansas, 1859 to 1860; Minnesota, 1851 to 1860; Mississippi, 1873 to 1875, with inconsequential exceptions; Nebraska, 1855 to 1861; New Mexico, 1852 to 1882; North Dakota and South Dakota, 1865 to 1866; Oregon, 1854 to 1863; South Carolina, 1866 to 1877; Texas, 1870 to 1876; and Wisconsin, 1849 to 1851. In seventeen states and one territory and in the District of Columbia, usury laws have been continuously in force from the date of the first law, the list being as follows: Delaware, District of Columbia, Iowa, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia and West Virginia.

As to the legal maximum rate, twelve states and territories set no limit and two practically none; in eleven the rate is six per cent, namely, Delaware, Kentucky, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, Tennessee, Vermont, Virginia and West Virginia; seven per cent is the rate in Illinois; eight per cent in nine states, namely, Alabama, Georgia, Indiana, Iowa, Michigan, Missouri, North Carolina,

[1] This was true January 1, 1892, which date is to be considered "the present time," in all references to existing laws in this article, unless otherwise stated.

[2] The limit of eighteen per cent established in Massachusetts in 1888 on loans of less than $1000 is so high that it is far above the daily affairs of the people.

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Ohio and South Carolina; ten per cent in the District of Columbia and in eight states, namely, Arkansas, Florida, Kansas, Minnesota, Mississippi, Nebraska, Oregon and Wisconsin; twelve per cent in five states and territories, New Mexico, North Dakota, Oklahoma, South Dakota and Texas; and eighteen per cent in Idaho.

The special rates applicable in some cases to banks have not been taken into account in the preceding classifications. Where there are no local usury laws national banks are limited to seven per cent by the National Currency Act; elsewhere the national banks are governed by the local laws, except that in states which assign to state banks of issue a limit different from that applicable to other lenders, "the rate so limited shall be allowed for associations organized in any such state under this act."[1] The national and state statutes confining banks to exceptionally low rates of interest are of little or no practical consequence as usury laws; for the banks easily evade their provisions. As it is not intended to make an exhaustive legal examination of the subject, no attention is paid to the rates of interest on judgments, on contracts after maturity and on contracts not specifying rates, or to compounding and the rates permitted to pawnbrokers.

The tendency of the legislation from the beginning to the present time, so far as any change is discernible, has been rather toward a lower maximum rate. In eighteen of the states and territories the rate has been lowered; in eleven and in the District of Columbia there has been an increase; and in twenty there has been no change. For some time after the Civil War higher rates than before the war were permitted in many states, and there has been a decline in these rates, generally, in recent years. The lowest limit ever fixed was five per cent, in Virginia in 1734; the highest, twenty-four per cent, in the territory of Dakota in 1866 and in Idaho in 1871.

A classification of the penalties for violation of usury laws requires many explanations and qualifications, only a few of which can be made. A distinction must be noticed between

[1] Section 30 of the National Currency Act, approved June 3, 1864.

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"loss" and "forfeiture." A lender who violates the law may "lose" his principal and legal interest because the law denies to him their collection from the borrower, or he may be allowed to collect them and may then be subject to a "forfeiture" of twice the amount of the interest if complaint is made by the borrower or some informer in an action separate from that brought by the lender for the collection of the debt. In some states the penalties are enforcible only in case the usury is actually received; in others, if it is merely agreed to. The general principle of the common law is that an indorsee of usurious negotiable paper for a valuable consideration before maturity without notice of the usury, cannot be made to suffer the penalty for the usury unless the contract was void at its inception,[1] and this opens a wide door for the evasion of the statutes. The excess above the legal interest can nowhere be collected; but if paid, in some states it can and in others it cannot be recovered by the debtor. The creditor's loss of this excess can hardly be considered a penalty, but in the abstract of interest laws that follows it is referred to when the usurer is subject to no other loss.

In seven states usury has no positive penalty, the usurer being merely disqualified from collecting the illegal interest if the debtor contests his claim; these states are Georgia, Kentucky, Maryland, Ohio, Pennsylvania, Vermont and West Virginia. An usurious contract involves loss of the interest or forfeiture of an equal sum in Alabama, the District of Columbia, Illinois, Michigan, Mississippi, Missouri, Nebraska, New Jersey, Oklahoma, Texas and Virginia — nine states, one territory and the District of Columbia. Both principal and interest are lost or an equal amount forfeited in Arkansas, North Dakota and Oregon. In Delaware principal and interest are lost and the amount of the same is forfeited; in Florida, North Carolina and South Carolina the interest is lost and double the illegal interest received is forfeited. In Idaho there is a forfeiture of ten per cent of the amount of the principal for each year during which the contract endures; in

[1] Parsons on Contracts, vol. iii, part 2, chapter 7.

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Indiana there is a loss of the interest above six per cent; in Iowa, a loss of interest and ten per cent of the amount of the principal for each year. The penalty in Kansas is a loss of the illegal interest and forfeiture of the amount of the same; in Minnesota, if usury is received, a loss of principal and interest and a forfeiture of the amount of the illegal interest actually received; in New Hampshire a forfeiture of three times the amount of the illegal interest received. Usury is a finable offence in New Mexico and the usurer is also subject to a forfeiture of double the amount of the illegal interest received. Both principal and interest are lost in New York, and there are fine and imprisonment besides. In South Dakota there is a loss of interest, with the penalty of a misdemeanor; in Tennessee, a fine and loss of illegal interest; and in Wisconsin the usurer loses interest and forfeits thrice the illegal interest received. A violation of the very limited usury law of Louisiana carries the penalty of loss of interest; in Massachusetts there is no penalty.

In only three states is usury a criminal offence and in none of these is the penalty necessarily imprisonment. In all other cases the penalty for usury in the United States is the risk of the usurer's wealth, the insurance for which, generally speaking, has always been collected in the rate of interest. As compared with the original, the penalty is at present less severe in eighteen of the states and territories having usury laws and in the District of Columbia, more severe in seven, and in ten it has remained substantially the same. There has been some discrimination against banks in fixing a lower limit for them than for other lenders, and also against corporations in refusing to them, as borrowers, the defence of usury.

In the abstract of laws that follows, the attempt is made to present a history of usury legislation in the United States from the earliest enactments to January 1, 1892, in regard to the rates of interest and the penalties for usury, written contracts being understood if any distinction is made in the law between them and oral contracts, and as far as the rate of interest is concerned, contracts before maturity with agreements as to the

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rate. In regard to the penalty, however, such a one as the loss of interest does not attach until suit is brought by the creditor after the maturity of the contract. Penalties are mentioned without description of the variable provisions that make them applicable, and numerous minor qualifications of the statements in the abstract are omitted because not called for in an article of this sort.

Historical Abstract of Usury Laws in the United States from the earliest times to January 1, 1892.

Alabama: 1805, six per cent — penalty, loss of interest; 1818, any rate; 1819, eight per cent — penalty, loss of illegal interest; 1820, penalty, loss of principal and interest and forfeiture of the amount of the same; 1852, penalty, loss of interest.

Alaska: No usury laws, except that under the National Currency Act, in force June 3, 1864, national banks are limited to seven per cent, with penalty of loss of interest and forfeiture of twice the amount of the illegal interest received.

Arizona: 1865, any rate, subject to the provisions of the National Currency Act, as above.

Arkansas: 1808, ten per cent — penalty, loss of interest; 1838, penalty, loss of principal and interest; 1868 (constitution), any rate, except that national banks come under the National Currency Act; 1874 (constitution), ten per cent — penalty, loss of principal and interest.

California: 1850, any rate, subject to the National Currency Act after June 3, 1864.

Colorado: 1861, any rate, subject to the National Currency Act after June 3, 1864.

Connecticut: 1702, six per cent — penalty, loss of principal and interest and forfeiture of the amount of the principal; 1849, penalty, loss of interest; 1854, six per cent for banks — penalty, fine of not less than $500, but not applicable to savings banks; 1872, any rate, subject to the National Currency Act; 1873, seven per cent — penalty, forfeiture of the amount of the interest; 1875, seven per cent for savings banks — penalty, fine of $1000 to $5000; 1877, any rate, subject to the National Currency Act.

Delaware: Before 1721, date unknown, eight per cent; 1721, six per cent — penalty, loss of principal and interest; 1855, banks limited to one per cent for 60 days — penalty, forfeiture of charter and directors to be fined.

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District of Columbia: Previous to 1870, six per cent — penalty, loss of principal and interest; 1864, subject to the National Currency Act; 1870, ten per cent — penalty, loss of interest, but the law in regard to national banks was not changed.

Florida: 1822, any rate; 1830, ten per cent — penalty, loss of principal and interest; 1832, any rate; 1833, ten per cent — penalty, loss of interest due; 1844, eight per cent — penalty, the same as before; 1866, any rate, subject to the National Currency Act; 1891, ten per cent — penalty, loss of interest and forfeiture of double the illegal interest received.

Georgia: 1759, eight per cent — penalty, loss of principal and interest and forfeiture of treble the amount of the principal; 1822, penalty, loss of interest; 1845, seven per cent — penalty, the same as before; 1857, banks taking more than seven per cent to forfeit treble the amount of the illegal interest and lose principal and interest; 1862, penalty, loss of illegal interest; 1871, ten per cent — penalty, the same as before; 1873, banks subject to the usury law; subsequently in 1873, any rate, subject to the National Currency Act; 1875, twelve per cent — penalty, loss of interest; 1879, eight per cent — penalty, the same as before; 1881, penalty, loss of illegal interest.

Idaho: 1864, any rate, subject to the National Currency Act; 1871, twenty-four per cent — penalty, forfeiture of treble the amount of the illegal interest and fine not exceeding $100 or imprisonment not exceeding six months, or both; 1875, penalty, forfeiture of the illegal interest received and fine and imprisonment as before; 1879, eighteen per cent — penalty, forfeiture of treble the amount of the illegal interest actually received and fine and imprisonment as before; 1887, penalty, forfeiture of ten per cent of the amount of the principal for each year.

Illinois: 1819, any rate, except that banks were limited to six per cent, with penalty of loss of principal and interest; 1833, twelve per cent — penalty, forfeiture of treble the amount of the interest; 1845, six per cent — penalty, the same as before, but, if usury was actually received, forfeiture of treble the amount of the illegal interest; 1849, ten per cent — penalty, the same as before; 1851, seven per cent for banks on secured loans; 1853, no corporation to interpose the defence of usury; 1857, ten per cent for banks; 1857, penalty, loss of interest; 1879, eight per cent — penalty, the same as before; 1891, seven per cent — penalty, the same as before.

Indiana: 1818, six per cent — penalty, loss of interest; 1831, any rate; 1833, ten per cent — penalty, forfeiture of double the amount of the illegal interest; 1842, six per cent — penalty, the same as before, Union County excepted until May 27, 1852; 1852, penalty, forfeiture

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of five times the amount of the illegal interest; 1861, penalty, loss of illegal interest; 1867, ten per cent — penalty, the same as before; 1879, eight per cent — penalty, loss of the excess over six per cent.

Iowa: 1839, twenty per cent — penalty, loss of illegal interest and forfeiture of twenty-five per cent of the amount of the principal; 1843, ten per cent — penalty, forfeiture of the amount of the excess actually received above six per cent; 1851, any rate; 1853, ten per cent — penalty, loss of interest and forfeiture of ten per cent of the amount of the principal for each year; 1890, eight per cent — penalty, the same as before.

Kansas: 1859, any rate; 1860, twenty per cent — penalty, loss of interest; 1863, twelve per cent — penalty, the same as before; 1872, penalty, loss of illegal interest; 1889, ten per cent — penalty, loss of illegal interest and forfeiture of the amount of the same.

Kentucky: 1798, six per cent — penalty, loss of interest; 1819, penalty, loss of illegal interest; 1871, ten per cent — penalty, loss of interest; 1876, eight per cent — penalty, the same as before; 1878, six per cent — penalty, loss of illegal interest.

Louisiana: 1805, banks limited to six per cent — no penalty; 1808, ten per cent — penalty, loss of interest; 1844, eight per cent — penalty, loss of interest; 1855, banks subject to the general usury law; 1856, penalty, loss of illegal interest; 1860, any rate on assignable contracts before maturity; 1870, penalty, loss of interest.

Maine: 1821, six per cent — penalty, loss of principal and interest and forfeiture of the amount of the same; 1834, penalty, loss of illegal interest; 1870, any rate, subject to the National Currency Act.

Maryland: 1692, six per cent for a loan of money, eight per cent for a loan of tobacco or other property — penalty, loss of principal and interest and forfeiture of treble the amount of the principal; 1860, six per cent — penalty, loss of illegal interest.

Massachusetts: 1641, eight per cent; 1693, six per cent — penalty, loss of principal and interest; 1826, penalty, loss of interest — penalty for banks, forfeiture of treble the amount of the interest; subsequently in 1826, penalty, forfeiture of treble the amount of the interest; 1846, penalty, forfeiture of treble the amount of the illegal interest; 1867, any rate, subject to the National Currency Act; 1870, bonds issued by corporations limited to seven per cent — no penalty; 1884, notes, bonds and scrip issued by municipalities limited to six per cent — no penalty; 1886, bonds issued by gas companies limited to six per cent — no penalty; 1888, eighteen per cent on loans of less than $1000 — no penalty.

Michigan: 1820, six per cent — penalty, loss of illegal interest and forfeiture of twenty-five per cent of the amount of the principal; 1830,

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seven per cent — penalty, the same as before; 1838, ten per cent — penalty, forfeiture of treble the amount of the illegal interest to debtor in case of suit on the contract brought by the creditor; 1843, penalty, loss of illegal interest; 1891, eight per cent — penalty, loss of interest.

Minnesota: 1851, any rate; 1858, fifteen per cent for banks on secured loans — penalty, fine of not less than $50 nor more than $500; 1860, twelve per cent — penalty, loss of illegal interest; 1866, twelve per cent for banks; 1877, penalty, if usury was actually received, forfeiture of the amount of the same and loss of principal and interest; 1879, ten per cent — penalty, the same as before, but not applicable to building and loan associations.

Mississippi: 1805, six per cent — penalty, loss of interest; 1818, eight per cent, but no limit for a *bona fide* loan of money — no penalty; 1822, eight per cent, but ten per cent for a loan of money — penalty, loss of interest; 1842, six per cent, but eight per cent for a loan of money — penalty, the same as before; 1854, ten per cent for a loan of money — penalty, loss of the illegal interest; 1856, ten per cent on all contracts — penalty the same as before; 1873, any rate, except that no more than ten per cent could be collected from a minor nor from the estate of a deceased debtor for interest accrued since his death, and except that national banks came under the National Currency Act; 1875, ten per cent — penalty, loss of interest; 1886, no limit for building and loan associations and law of 1875 applied to banks.

Missouri: 1813, ten per cent — penalty, loss of interest; 1847, six per cent — penalty, interest at agreed rate forfeited; 1856, ten per cent — penalty, the same as before; 1887, no limit for building and loan associations; 1891, eight per cent — penalty the same as before.

Montana: 1865, any rate, subject to the National Currency Act.

Nebraska: 1855, any rate; 1861, fifteen per cent — penalty, loss of interest; 1867, twelve per cent — penalty, the same as before; 1879, ten per cent — penalty, the same as before.

Nevada: 1861, any rate; 1864, subject to the National Currency Act.

New Hampshire: 1791, six per cent — penalty, forfeiture of treble the amount of the illegal interest; 1872, penalty, forfeiture of treble the amount of the illegal interest actually received.

New Jersey: 1738, seven per cent — penalty, loss of principal and interest; 1824, six per cent — penalty, the same as before; 1846, six per cent, except in several towns, cities and counties, after certain dates — penalty, the same as before; 1864, penalty, loss of interest; 1866, seven per cent throughout the state — penalty, the same as before; 1874, usury law not applicable to bonds and mortgages of corporations; 1875, penalty in Monmouth County, loss of principal and interest; 1878, six per cent throughout the state — penalty, loss of interest.

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New Mexico: 1852, any rate; 1864, subject to National Currency Act; 1882, twelve per cent — no penalty; 1884, penalty, forfeiture of double the amount of the illegal interest actually received and fine of not less than $25 nor more than $100.

New York: 1717, six per cent; 1718, eight per cent; 1737, seven per cent; 1787, penalty, loss of principal and interest; 1830, penalty not applicable to indorsee of negotiable paper without notice of usury; 1837, law as to indorsee repealed and penalty made a fine not exceeding $1000 or imprisonment not exceeding six months, or both, in addition to loss of principal and interest; 1850, no corporation to interpose the defence of usury; 1880, six per cent — penalty, the same as before; 1882, penalty for banks, loss of interest and, if usury is actually received, forfeiture of twice the amount of the same; 1882, any rate for demand loans of $5000 or more on collateral security, but subject to the National Currency Act.

North Carolina: 1741, six per cent — penalty, loss of principal and interest and double the amount of the principal forfeited; 1843, usury law not applicable to indorsee of assignable paper; 1866, eight per cent for a loan of money, six per cent on other loans — penalty, loss of interest; 1875, eight per cent in all cases — penalty, loss of principal and interest, forfeiture of double the amount of the principal and fine of not less than $100 nor more than $1000; 1877, penalty, loss of interest and recovery of twice the amount of the illegal interest actually paid.

North Dakota: 1865, any rate, subject to the National Currency Act; 1866, twenty-four per cent — penalty, loss of principal and interest; 1875, twelve per cent — penalty, loss of interest; 1877, penalty, that of a misdemeanor (and loss of interest, as before); 1881, any rate in certain counties, subject to the National Currency Act; 1887, violation not a misdemeanor; 1887, exception in favor of certain counties repealed; 1889, penalty, that of a misdemeanor (and loss of interest, as before); 1890, penalty, loss of principal and interest, but not applicable to building and loan associations, nor to indorsee of negotiable paper without notice of usury.

Ohio: 1799, six per cent — penalty, loss of interest; 1804, penalty, forfeiture of the amount of the principal and interest; 1824, penalty, loss of illegal interest; 1850, ten per cent, six per cent for banks unless a higher rate permitted by charter — penalty, loss of principal and interest; 1859, six per cent — penalty, loss of illegal interest; 1869, eight per cent, but national and state banks still limited to six per cent — penalty, the same as before.

Oklahoma: Session of legislature ending December 24, 1890, twelve per cent, but no limit for building and loan associations — penalty, loss of interest.

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Oregon: 1854, any rate; 1863, twelve per cent — penalty, loss of interest and forfeiture of the amount of the principal; 1880, ten per cent — penalty, the same as before; 1885, the tax on the loan may be paid by the borrower, if the rate of interest is not higher than eight per cent.

Pennsylvania: Before 1700, date unknown, eight per cent; 1700, six per cent — penalty, the amount of the principal forfeited; 1705, eight per cent — penalty, the same as before; 1723, six per cent — penalty, the same as before; 1842, no limit for debts of railroad and canal corporations; 1850, banks limited to one-half of one per cent for thirty days — penalty on officer violating, fine of not more than $1000 and imprisonment not exceeding three years; 1857, seven per cent for agents and commission merchants of persons not living in the state, on balance retained and advancements; 1858, penalty, loss of illegal interest; 1865, the tax on the loan may be paid by the borrower; 1878, state banks limited to six per cent; 1887, repeal of the law permitting the borrower to pay the tax on the loan.

Rhode Island: 1767, six per cent — penalty, loss of interest and forfeiture of one-third of the amount of the principal and all the interest; 1822, penalty, loss of interest; 1844, penalty for banks, fine of $500; 1865, any rate, subject to the National Currency Act.

South Carolina: 1691, ten per cent; 1719, penalty, loss of principal and interest and forfeiture of treble the amount of the principal; 1748, eight per cent — penalty, the same as before; 1777, seven per cent — penalty, the same as before; 1830, penalty, loss of interest; 1866, any rate, subject to the National Currency Act; 1877, seven per cent — penalty, loss of interest; 1882, ten per cent — penalty, loss of interest and forfeiture of double the amount of the illegal interest actually received; 1890, eight per cent — penalty, the same as before.

South Dakota: The same as North Dakota previous to the law of 1890. (See North Dakota.)

Tennessee: 1741, six per cent — penalty, loss of principal and interest and forfeiture of double the amount of the principal; 1819, penalty, loss of illegal interest and fine; 1858, penalty, loss of illegal interest and fine of not less than $10 nor more than the amount of the illegal interest; 1870, ten per cent — penalty, loss of interest above six per cent and fine of not less than $100; 1877, six per cent — penalty, loss of illegal interest and fine of not less than $10 nor more than the amount of the illegal interest.

Texas: 1840, twelve per cent — penalty, loss of interest; 1870 (constitution), any rate, subject to the National Currency Act; 1876 (constitution), twelve per cent — penalty (act of legislature), loss of interest;

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1891 (constitution), ten per cent — penalty to be provided by next legislature.

Utah: 1868, any rate, subject to the National Currency Act.

Vermont: 1787, six per cent — penalty, forfeiture of the amount of the principal; 1797, penalty, loss of illegal interest and forfeiture of twenty-five per cent of the amount of the principal; 1823, loss of illegal interest.

Virginia: 1730, six per cent — penalty, loss of principal and interest and forfeiture of twice the amount of the principal; 1734, five per cent — penalty, the same as before; 1797, six per cent — penalty, the same as before; 1870 (constitution), twelve per cent — penalty (act of legislature), the same as before; 1872, limitation of twelve per cent by constitution annulled; 1873, corporations not to interpose defence of usury; 1873, eight per cent — penalty, loss of interest above six per cent; 1874, six per cent — penalty, loss of interest.

Washington: 1854, any rate; 1864, subject to the National Currency Act.

West Virginia: 1868, six per cent — penalty, loss of illegal interest, but corporations not to interpose defence of usury.

Wisconsin: 1839, twelve per cent, but seven per cent for banks, unless otherwise provided by charter — penalty, forfeiture of treble the amount of the illegal interest; 1849, any rate; 1851, twelve per cent — penalty, loss of principal and interest and forfeiture of treble the amount of the illegal interest received; 1852, ten per cent for banks until 1860 and seven per cent thereafter; 1856, penalty, the same as before if usurious interest was paid, but if usurious interest was reserved in a contract, the penalty was the loss of interest and forfeiture of treble the amount of the illegal interest; 1859, penalty, loss of interest and forfeiture of treble the amount of the illegal interest; 1860, ten per cent — penalty, the same as before; 1863, seven per cent — penalty, the same as before; 1866, ten per cent — penalty, the same as before; 1871, penalty, loss of interest and, if usury had been received, forfeiture of treble the amount of the illegal interest; 1876, usury law not applicable to building and loan associations.

Wyoming: 1869, any rate, subject to the National Currency Act.

The legislation summarized in this abstract reveals a total lack of any dominant principle or tendency among the states. Though the protection of the borrower against extortion is the reason given for usury laws, Washington, with a scarcity of domestic capital, is without them and so falls in the same class with Connecticut, where the domestic capital is greater than

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can be employed in the state. And South Dakota, which should be in the same class with Washington, on the other hand makes usury a criminal offence. There is no good reason why Rhode Island and New Hampshire should not be in the same class, yet the former permits any rate of interest, while the latter fixes the maximum at six per cent. Assuming that some sort of usury law is desirable, the fallibility of legislatures in determining what it shall be is apparent. On any ground ever employed to defend usury laws, it is hard to explain why in Vermont, with all the changes in finance, industry, the production of wealth, the cost of living and other matters affecting the debtor's ability to pay interest, the limit should have remained at six per cent for over a hundred years, or that eight per cent should have been the highest rate in Alabama continuously since 1819, or that the maximum in Illinois should have been twelve, six and ten, respectively, at such short intervals as 1833, 1845 and 1849. After comparing the rates fixed in adjoining states at the same time and taking note of the many, and often radical, changes in the same state, the conclusion follows that legislatures have been fitted to deal with this matter only in a very rough way and that on the one hand politicians, bidding for the support of class interests and prejudices, and on the other hand money lenders, striving to take down the bars against extortion, have probably had much influence in the legislation.

II. *The Practical Operation of Usury Laws.*

Whether usury laws are correct in theory or not, it is important to know something about their practical effect. There is undoubted faith in them among the masses of the people, after centuries of trial, but to determine whether it is faith in a sentiment or whether it is founded on the practical and successful operation of these laws, may need more evidence than is obtainable. However, the evidence at hand will warrant a conclusion that will stand until further and contrary evidence is adduced.

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How many times the courts have been called upon to enforce the laws against usury is not known, even with scant approximation to the truth, but it is presumable that many thousands of actions have been instituted in the various states and territories for this purpose, since the cases that have been carried to supreme courts alone number many hundreds. If all these cases were decided against the creditors, still it would not follow that the laws have been generally obeyed. Larceny is still a common crime, although thousands of thieves have been convicted. Nor is it to be presumed that all violations have been brought into court. Usury cases may not represent much more than that disposition of men to violate the obligations of their agreements to which court reports abundantly testify throughout the entire domain of contracts, and the probability of success in violation is especially promising in usury cases. What does and what does not constitute a violation of the ordinary usury law, is now pretty well established by supreme court decisions, and the chief effect of these decisions seems to be to reveal to the lender how the intent of the law may be safely transgressed while the letter of the law is obeyed.

Except in Nebraska and North Dakota, a commission for obtaining a loan, if paid to a third person without the knowledge, consent or authority of the lender, is not in law a part of the rate of interest. The supreme court of Minnesota intimates that a commission is no part of the rate unless it is proved that the lender received all or a part of it, directly or indirectly;[1] and the supreme court of Mississippi unequivocally takes this view of the law.[2] Aside from legal considerations, the question remains whether a commission may reasonably be regarded as a part of the interest from the *borrower's* point of view. It is certainly a part of the cost of the money to him, whatever name may be given to it, and as an element of cost it may defeat the intent of the usury law. The authors of the law, presumably, intended to make it possible in all cases for the borrower to obtain a loan at a cost not greater than the interest at the

[1] Acheson *vs.* Chase, 28 Minn. 211 (1881).

[2] Pass *vs.* The New England Mortgage Security Company, 66 Miss. 365 (1889).

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highest legal rate. In such case the law is obviously inadequate.

The payment of commissions is the chief means by which usury laws are nullified, so far as they are designed to limit cost. A correspondent in Missouri, who has full knowledge of the Western loan business, thus describes how a commission increases the rate of interest:

> A loan for $2000 is made for five years with interest at nine per cent; the Eastern lender, who supplies the money, gets a first mortgage for this amount bearing interest at six per cent, and the company through which the loan is made receives a second mortgage for $300, without interest until maturity, representing fifteen per cent, or three per cent annually, of the principal, but due two and a half years after date. In other words, the loan company gets the money for six per cent and lends it for nine per cent. The transaction is finished with a small cash payment, by way of premium, made by the loan company to the local agent for his services in finding the borrower.

This is the simplest form of the contract, for it has many variations, the effect of which is always to increase the cost to the borrower. Although the highest rate permitted by law in Iowa, where we may suppose that the contract above described is made, has been eight per cent since 1890, yet the supreme court would decide that the contract is not usurious.

> The law is well settled [says the court of that state] that where an agent for loaning money takes a bonus or commission to himself beyond the legal rate of interest without the knowledge, authority or consent of his principal, it does not affect with usury the loan of the principal.[1]

The court goes even farther and decides that in such a case the note and second mortgage given to secure the commission may be collected.[2] These decisions are in accordance with the common law of principal and agent and are supported by decisions in other states, so that they probably express the law throughout the United States, wherever usury laws exist, outside of Nebraska and North Dakota. Some decisions hold that the loan agent is

[1] Brigham *vs.* Myers, 51 Iowa, 397 (1879).
[2] Wyllis *vs.* Ault, 46 Iowa, 46 (1877).

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the agent of the borrower in so far as he takes a commission; others rest upon the conclusion that, although he is the agent of the lender in making the loan, yet the taking of the commission was neither authorized nor sanctioned by the latter, and therefore that he, as principal, was not responsible for it; and some of the cases seem to be determined ultimately by the absence of proof that the lender has received any of the commission.

In a form of the transaction other than the one above described, the borrower receives a less amount than that which he agrees to repay, the difference being retained in cash by the agent; but this contract, also, though it costs the borrower more than the legal rate of interest, is supported by the courts. A New York lender placed money in the hands of an agent in Minnesota to let at twelve per cent, which was the highest legal rate, paying him nothing for his services, but understanding that the borrower would pay for them. A borrower gave his note to the New York principal for $500 with interest at twelve per cent, but received only $432, because, by agreement, the agent retained $68 for his services. The transaction was decided by the Minnesota supreme court not to be usurious.[1] A loan of $3000 for five years at eight per cent, was made in Mississippi for the New England Mortgage Security Company by the Corbin Banking Company of New York through an agent in Memphis, Tenn., who employed an agent in Mississippi; the borrower received $2400, but gave a mortgage for $3000 bearing interest at eight per cent, so that the actual rate on the money received was ten per cent, while eight per cent was the maximum legal rate. The $600 was so divided that the Mississippi agent received $60, the Memphis agent $84.30 and the New York agent $455.70. The court sanctioned this contract and said: "If a borrower has to pay others than the lender for the means of obtaining the loan, that is not usury; for it is not the price of the use of money, but the cost of getting it at all."[2] The reasons advanced by courts for sustaining contracts like

[1] Acheson *vs.* Chase, 28 Minn. 211 (1881).

[2] Pass *vs.* The New England Mortgage Security Company, 66 Miss. 365 (1889).

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the preceding vary more or less with the states and with the circumstances, and if a commission to an agent is held to render a contract usurious, it is often because of some technical incident that might have been avoided.[1]

In Nebraska, however, the decisions are to the contrary,[2] and the reason therefor is the conclusion that the loan agent is the agent of the lender in taking the commission and that the latter is responsible for the act. This is supported by statute law, which provides that "the acts and dealings of an agent in loaning money shall bind the principal," and that "where the same person acts as agent for the borrower who obtains the money from the lender, he shall be deemed to be the agent of the lender also."[3] North Dakota has the same law.[4] Nebraska and North Dakota thus hold the lender to the same responsibility for the commission as if he received it himself, and in the latter case all the states that have usury laws would consider the commission as a part of the interest.

It has repeatedly been declared by supreme courts that the object of usury laws is to protect the borrower, but the result of the decisions outside of Nebraska and North Dakota is that he may have no protection against excessive cost if an agent intervenes. To the extent that the agent and not the lender gets the benefit of the commission, borrowers suffer through middlemen.

Yet it is not always the agent alone who enjoys the benefit of the commission; he is often merely a mask for the extortion of the lender. A correspondent, who is a well-known lawyer

[1] The following cases sustain the statements of the text: Condit *vs.* Baldwin, 21 N. Y. 219 (1860); Rogers *vs.* Buckingham, 33 Conn. 81 (1865); Gokey *vs.* Knapp, 44 Iowa, 32 (1876); Eaton *vs.* Alger, 2 Keys, 41 (1865); Dickey *vs.* Brown, 56 Iowa, 426 (1881); Merck *vs.* The American Freehold Land Mortgage Co., 79 Ga. 213 (1887); Gray *vs.* Van Blarcom, 2 Stewart (1878); Nichols *vs.* Osborn, 14 Stewart, 92 (1886); Phillips *vs.* Mackellar, 92 N. Y. 34 (1883); Vahlberg *vs.* Keaton, 51 Ark. 534 (1889); Atlanta Mining and Rolling Mill Co. *vs.* Gwyer, 48 Ga. 1 (1873); Boylston *vs.* Bain, 90 Ill. 283 (1878); Landis *vs.* Saxton, 89 Mo. 375 (1886); Call *vs.* Palmer, 116 U. S. 98 (1885).

[2] Philo *vs.* Butterfield, 3 Neb. 256 (1874); Cheney *vs.* White, 5 Neb. 261 (1876); Cheney *vs.* Eberhardt, 8 Neb. 423 (1879).

[3] Statutes of Nebraska, session of 1879, p. 114, sec. 5.

[4] Statutes of North Dakota, session of 1890, chap. 184, sec. 7.

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of New Mexico, describes a common procedure in that territory:

> A has money to lend; he also has some hanger-on, B, generally a "tin-horn gambler," a worthless, drunken wretch. C is a miner, a farmer, an artisan, a stock raiser or a small shopkeeper. C has no acquaintance with A and there is no bank in the town where C lives, or B is in the employ of the bank and it refuses to lend money to C. C has heard B boast that he can get all the money he wants, or he has heard this from some one else. C approaches B with regard to borrowing and B tells him that he can get the money in a day or two. B could get the money immediately, but time is required to investigate the security and C's extremities. It is a developed mine of promise or production; or it has been shut down by a law suit; or C needs the money to pay for labor, materials or food; or the floods have destroyed his crops; or the year is a bad one for cattle. B demands twice or thrice the highest legal rate, which is twelve per cent; C objects, but finally consents, and a compromise is made somewhere between twelve and thirty-six per cent. The excess is divided between A and B, the latter often getting more than half.

This is an adaptation of a familiar device and, if executed with outward conformity to the law, is practically a successful evasion of the ordinary usury law. Despite much legislation on the subject, it is still practically impossible to get evidence that a lender divides the commission with an agent.

It was said by Chief Justice Marshall in 1835 that the ingenuity of lenders had devised many contrivances by which, under forms sanctioned by law, the statutes against usury had been evaded;[1] and he mentioned, as one of the earliest and most common of these, the purchase of annuities secured by real estate or otherwise. Although more than the legal interest were obtained, this had never been considered as usurious, not only because the principal may have been put at hazard, but because it was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling. But, he said, if the purchase of an annuity or rent charge is in fact a loan, it is a shift to evade the law and will not be protected. In the case under consideration a bor-

[1] Scott *vs.* Lloyd, 9 Peters, 418 (1835).

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rower had obtained $5000 by conveying to the lender a perpetual rent charge which was equivalent to interest at a usurious rate, but the contract gave to the borrower the option of buying in the rent charge for $5000 at the end of five years. The defence of usury was subsequently set up and was sustained by the supreme court.

A sale of goods at a price beyond their value on a credit, when the object is to cover a loan of money at a usurious rate, has always been held to be within the statute of usury.[1] A transaction whereby one contracts to pay the maximum rate allowed by law, and in order to procure the loan agrees to take from the lender a policy of insurance and to pay him premiums thereon, is usurious.[2] A purchaser of land had paid a part of the purchase money and was unable to pay the remainder on the day fixed; a resale was resorted to, as a cover for usury, and it was declared void.[3] In the South there is a common transaction in which the farmer receives an advance of supplies from a merchant, to be paid for out of the next crop. It brings to the merchant a high rate of profit on the goods sold to the farmer, and upon a fair consideration it would seem to involve a loan as well as a sale. The Arkansas supreme court takes this view of the matter in the case of Ford *vs.* Hancock[4] and limits the price of goods sold on credit by the following principle, which might have been more clearly stated:

> It is not usury for one to sell property on credit for a higher price than he would have sold it at for cash and legal interest added. But if the sale be really made on a cash estimate and time be given to pay, and an amount is agreed to be paid greater than the cash price with legal interest would amount to, this is a usurious agreement for forbearance.

The opinion of the supreme court of Georgia is in accordance with this.[5]

These cases are referred to as illustrations of the disposition of the courts of this country to ignore the refinements of legal

[1] Archer *vs.* Putnam, 12 S. and M. 286 (1849).
[2] Missouri Valley Life Insurance Co. *vs.* Kittle, 2 Federal Reporter, 113 (1880).
[3] Crippen *vs.* Hurmance, 9 Paige, 211 (1841).
[4] 36 Ark. 248 (1880). [5] Irwin *vs.* Matthews, 75 Ga. 739 (1885).

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logic in usury cases and to go behind the form and technicalities of contracts to discover real usury. Did space permit, many cases of this character might be described. A few apparent evasions of the law are yet protected, but the circumstances surrounding these are of comparatively rare occurrence. It has been held in Alabama that a commission merchant's charge of five per cent in addition to the highest rate permitted by law, for accepting bills or drafts on him by his customers and advancing money on them, is not usurious, if intended as a fair compensation for the risk, trouble and expense incurred and a jury finds that it is such compensation.[1] It is an acknowledged exception to the statute of usury that, when the principal is subject to substantial risk, more than the maximum legal rate may be received.[2] But this risk must not be the ordinary possibility of the debtor's insolvency. Examples of risk that is sufficient to make an exception to the statute are found in a contract to repay a loan with a certain number of heifers or bushels of corn, and in an agreement that advances for victualling a ship should be repaid with usury upon its return from a voyage[3] — the risk in these cases being the possible fall in the price of heifers or corn, and the possible failure of the ship to return.

The exemption of the indorsee of negotiable paper from the penalties for usury and, in many states, of the payee after indorsement, offers to the usurer a method that is often employed to evade the statute.

From the foregoing review it appears that the statutes of usury in the United States cover substantially all transactions in borrowing except the payment of a commission by the borrower to an agent for his own use, and, to some extent, except the transfer of negotiable contracts. So far as legislation can effect it,

[1] Brown *vs.* Harrison, 17 Ala. 774 (1850); Schiffer *vs.* Feagin, 51 Ala. 336 (1874).

[2] Plunkett *vs.* Dillon, 4 Del. 198 (1871); Stevenson *vs.* Unkefer, 14 Ill. 103 (1852); Heytle *vs.* Logan, 1 Mar. 531 (1819); Pomeroy *vs.* Ainsworth, 22 Barb. 118 (1856); Truby *vs.* Mosgrove, 118 Pa. St. 89 (1888); Spain *vs.* Hamilton's Admrs., 1 Wallace, 605 (1863).

[3] Morrison *vs.* McKinnon, 12 Fla. 552 (1869); Cummings *vs.* Williams, 4 Wend. 680 (1830).

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then, the borrower is fairly well protected. An examination of the decisions of the courts leaves no doubt about this. But, as a matter of fact, has not usurious interest been paid when agency or indorsement did not intervene? This must be answered in the affirmative by every one who has had opportunities to observe or who has heard the statements of other observers. The Western borrowers of small sums on chattel security pay high rates of interest, and everywhere borrowers whose possible insolvency is taken into account by lenders suffer a consequent disadvantage. Men often do not insist upon the enforcement of their legal rights and they have not always asked for the relief from usury that the law has guaranteed. In communities where loan capital is scarce or is monopolized, this is somewhat due to the fear that its supply may be shut off if the penalty of the law is invoked; it is partly due, also, to ignorance; and it is largely due to the disposition of men to submit to circumstances. This will not seem absurd when it is realized that borrowers at usurious rates of interest are relatively few.

Kansas may be referred to as having presented conditions that are among the more favorable for inviting violation of the usury laws within the last decade, and yet the great mass of the contracts for real estate loans made during that time were not usurious. Eastern lenders have been receiving from seven to eight per cent on their real estate loans in that state; but the highest legal rate was twelve per cent until May 25, 1889, when it was lowered to ten per cent. The large supply of Eastern capital has in a great degree determined the interest rates of the state. On real estate mortgages commissions have increased the cost of borrowing above the rates of interest mentioned, and the extent to which this is true is thus stated by a correspondent who has been in the loan business in that state on a large scale for twenty years:

> Where loans are made for one year the commission varies greatly, according to the size of the loan, the rate of interest and the kind of security offered. It would be from one to three per cent as a rule. On loans for five years the commission will range from three to seven

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per cent; the average, I think, would be about five per cent, making about one per cent a year on the money.

The average life of a mortgage in Kansas is 3.384 years.[1]

Among the early results of the investigation of real estate mortgages by the census office have been published the interest rates borne by 2,218,640 mortgages, made to secure a debt of $2,174,758,178, in Alabama, Illinois, Iowa, Kansas and Nebraska during the ten years 1880–89. The office did not limit interest rates to what was received by lenders, but included commissions and bonuses, and the returns were made mostly by special agents who were residents of the regions in which they worked, so that they were acquainted with local practices pertaining to lending. An effort was made, also, to ascertain and report the true rate of interest received by Southern merchants who had advanced supplies to farmers. The results obtained by the census office, therefore, disclose very nearly what the cost of loans was to borrowers within the period of ten years. During this time the highest legal rate in Alabama and Illinois was eight per cent; in Iowa and Nebraska, ten per cent; and in Kansas, twelve per cent until May 25, 1889, when it was reduced to ten per cent. The following table exhibits in summary form the results of the investigation in the five states:[2]

USURIOUS REAL ESTATE MORTGAGES IN FIVE STATES.

STATES.	TOTAL MORTGAGES.		USURIOUS MORTGAGES.		PERCENTAGES.	
	Number.	Amount.	Number.	Amount.	For Number.	For Amount.
Alabama .	93,828	$91,099,623	26,349	$12,395,715	28.08	13.61
Illinois . .	612,249	870,699,940	1,039	1,308,100	0.17	0.15
Iowa	520,448	439,936,354	165	103,467	0.03	0.02
Kansas . .	654,243	498,653,903	759	396,708	0.12	0.08
Nebraska .	337,872	274,368,358	313	278,758	0.09	0.10
Total	2,218,640	$2,174,758,178	28,625	$14,482,748	1.29	0.67

[1] Extra Census Bulletin, No. 16, p. 5.
[2] *Ibid.*, No. 16 and No. 20.

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The percentages for number being generally larger than for amount, it follows that usurious mortgages were for smaller amounts, on the average, than those that were not usurious. This accords with observation, that the "necessities" that overtake borrowers who are able to offer real estate security are generally of less magnitude than their so-called voluntary enterprises. Further evidence of this is presented in the next table, which shows the same relation of percentages for mortgages made to pay farm and family expenses. The paper manufacturer in a certain state who borrowed $80,000 to expand his business, did so voluntarily; but, to quote another actual occurrence, the poor Tennessee widow who mortgaged her little home for $13 in 1887 to pay her husband's funeral expenses, and after more than two years still owed $7.65, felt a hard necessity that can be endured only in homœopathic doses.

There is therefore statistical warrant for saying that in number as well as in individual magnitude the cases of "necessity" are of minor account. The census office has reported the results of special investigations in twenty-three counties in Alabama, Illinois, Iowa, Kansas, Nebraska and Tennessee, conducted partly to discover the reasons why real estate mortgage debt is incurred.[1] The deferred payment of the purchase money of real estate was the sole cause generally of from fifty to seventy-five per cent of the original amount of the existing debt in these counties, that is, of the amount before partial payments were made, and the number of mortgages for this object was generally within the same range of percentages of the total number in force. Real estate purchase and improvements, when not associated with other objects, generally accounted for from sixty-five to ninety per cent of both number and amount of the mortgages. When with these objects were included business and the purchase of personal property, the percentages were generally from eighty-five to ninety-five for number and for amount. Farm and family expenses, standing alone as an object, were represented generally by less than five per cent for both number and amount. The various percent-

[1] Extra Census Bulletins, No. 16 and No. 20.

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ages for the twenty-three counties are found in the following table:

OBJECTS OF REAL ESTATE MORTGAGE INDEBTEDNESS, BY PERCENTAGES.

STATES AND COUNTIES.	PURCHASE OF REAL ESTATE.		PURCHASE OF REAL ESTATE AND IMPROVEMENTS.		PURCHASE OF REAL ESTATE, IMPROVEMENTS, BUSINESS, AND THE PURCHASE OF PERSONAL PROPERTY.		FARM AND FAMILY EXPENSES.	
	For number.	For amount.	For number.	For amount.	For number.	For amount.	For number.	For amount.
ALABAMA:								
Greene	35.68	47.97	39.46	55.71	52.43	71.16	38.38	24.05
Jefferson	67.26	67.29	89.16	92.32	92.92	95.95	4.34	0.23
ILLINOIS:								
Bureau	60.42	62.16	75.22	78.29	82.60	85.39	2.57	1.58
Iroquois	76.12	79.71	89.95	92.25	93.64	95.92	1.16	0.67
Jasper	51.40	52.66	68.42	66.82	84.30	86.46	6.99	4.63
Morgan	53.08	60.10	80.60	78.59	89.58	92.16	5.29	4.11
IOWA:								
Cass	70.05	70.28	87.89	87.15	95.21	96.06	0.68	0.26
Crawford	65.68	66.49	87.95	86.29	94.79	96.08	2.18	1.55
Delaware	66.95	72.36	83.34	85.17	90.30	93.40	4.36	1.91
Johnson	69.13	76.60	87.04	90.14	92.10	95.19	3.82	1.41
KANSAS:								
Decatur	32.20	30.80	53.30	51.96	68.99	69.62	6.16	4.93
Jefferson	62.99	65.34	79.34	77.92	94.55	95.79	1.82	1.31
Lincoln	44.81	47.02	70.06	69.59	86.36	88.26	4.16	2.43
Lyon	51.57	50.43	74.56	69.69	86.80	87.82	4.64	2.41
Pawnee	45.22	50.10	73.46	77.71	86.67	89.70	4.37	2.59
NEBRASKA:								
Brown	17.95	13.69	70.45	65.18	95.12	96.39	0.73	0.45
Gage	48.52	54.80	88.00	87.73	95.84	96.62	1.22	0.45
Hayes	35.24	28.46	83.79	77.82	95.54	95.35	0.41	0.26
Kimball	92.92	94.23	98.10	97.56	98.64	97.90	...	...
Thayer	58.31	58.19	84.90	82.31	95.25	96.13	1.85	1.31
Washington	58.13	56.00	83.31	81.41	91.97	93.31	3.23	1.74
TENNESSEE:								
McNairy	49.47	31.60	57.89	34.81	71.58	69.97	8.42	2.35
Maury	59.58	62.50	83.33	84.72	91.52	94.24	4.03	1.58

These percentages cannot differ much from those that could be derived from the other counties of the same states, and they undoubtedly characterize the real estate mortgage debt of $1,039,571,848 existing in those states January 1, 1890; indeed, it may be inferred that the same percentages are approximately true of the entire real estate mortgage debt of the people of the United States, which may be estimated to be not far from $4,500,000,000.

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The borrower's freedom from "necessity" when he mortgages to secure deferred payments on a purchase of real estate distinctly appears in Kentucky, where he usually pays interest at six per cent, while mortgages given for other purposes often bear interest at eight per cent.

The foregoing table not only establishes the fact but suggests the reason why borrowers with "necessities" are relatively so few, at least among borrowers on real estate security. The necessity that in a way forces borrowing may consist either in impending loss or sacrifice or in need of the necessaries of life. When a man who hires his home has saved wealth enough to pay partly for a home of his own and can secure the remainder of the price with a mortgage, he proceeds to purchase; but, whether the seller or a third person takes the mortgage, the purchaser is subject to no "moral duress" in his proceeding, and consequently cannot be subject to it in the matter of interest. He can buy or not buy, just as he estimates the pleasures of home owning; and if he does not buy, he still lives on as he has lived before. But when, after he has become a debtor, he needs to renew the loan, it is true that he is not so clearly the free agent that he was when he first borrowed. The act of borrowing is dictated by necessity, in the popular meaning of that word, when by means of it loss or sacrifice may be lessened or prevented. A South Dakota farmer has suffered crop failure and when spring arrives he has no seed wheat. If his farm ceases to be productive, he must abandon it, and if he has any property on which he can secure by mortgage the price of the seed wheat that he needs, there is a possibility that he will not have to abandon the farm, and he is in a situation where he may be subjected to "moral duress" by a lender; that is, the farmer will weigh the prospective abandonment of his farm against an exorbitant rate of interest, and he will agree to pay the interest. Such a purchase as that of seed wheat, as an object of indebtedness, has been classified under "farm and family expenses" in the preceding table; and in this class are included expenses for food, clothing and sickness, taxes, store accounts, *etc.* Some of the mortgages classed as belonging to

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business may have been caused by "necessity," as when business has been carried on at a loss and more capital is needed to prevent further loss.[1] In the purchase of personal property, too, as classified in the preceding table, there may be "necessity." If a distemper kills the only team of horses that a farmer has and the ploughing season is at hand, he may need to mortgage his farm to buy another team. Or the roof of his barn may be so rotten that the garnered crops beneath will spoil if it is not shingled without further delay, even if done on credit at a high rate of interest. His barns may have been destroyed by flood or fire and he cannot without further loss postpone rebuilding, even if he buys lumber by means of a usurious mortgage. The mention of these cases of borrowers' necessity warrants the conclusion reached both from ordinary observation and from the preceding tables that, the whole country considered, they are of comparatively infrequent occurrence.

There are communities, it is true, where usury is often practised. There is a bank in a certain Western state that commonly gets interest at rates as high as sixty per cent on its mortgage loans, and it has not been called to account for this in any court. The explanation of a well-informed correspondent is that, in places where this bank and its branches do business without competition, the farmers, who are chiefly its borrowers, must submit to these high rates or fail to obtain loans; while, in places where there is competition, there is somewhat more than the ordinary risk of insolvency of its borrowers and they cannot obtain money from other sources. In all cases there is a general disposition not to appeal to the law against usury. Some of the borrowers are too ignorant to know that they have a remedy at law; others expect to be out

[1] How numerous, relatively, cases of this sort are in business life, is not fully known, but Mr. Albert C. Stevens, editor of *Bradstreet's*, has thrown some light on the subject. The conclusions he derives from statistics collected by the Bradstreet Company are that one person in every ninety-four (1.06 per cent) engaged in business in commercial, financial and industrial lines fails each year with liabilities in excess of assets, and that, in all probability, one in every nine or ten fails each year without financial loss to others. — *Publications of the American Statistical Association*, March, 1891, p. 186.

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of debt with one or two years of good crops, or, if the crops fail, to abandon their farms; others, again, fear to shut off the supply of loan capital; and still others share in the general spirit of submission to circumstances which all feel more or less. The mortgages on their face are not usurious, because the commissions and bonuses that are ultimately received by the bank are paid to the cashier for "finding the money"; and many of the mortgages are assigned to Eastern lenders, who, as in the case of nearly all the other Eastern investors in Western real estate securities, are not usurers. It is in those typical communities where loan capital is scarce or is controlled by a very few men, that usury, or at any rate the cost of loans above the legal interest rate, is more than sporadic. Such communities do not include a large proportion of the people of the United States and probably not a considerable proportion. A few instances of exorbitant interest gain more notoriety than millions of instances that come within the limits of the law.

Human nature being as it is, the number of the cases of "necessity" must be small or usury laws must be a dead letter. The legal limit to the rate of interest is hardly anywhere too low for the borrower who has good security to give, or about whose solvency there is no doubt. Would-be borrowers who are not in this class must submit to one of two things: either they must pay a higher than the ordinary rate of interest, even though usurious, or they must fail to find a lender, and the common fact is that they do fail to find a lender, even where no usury laws exist. Financial confidences are so discreetly established that as a rule men who are not fitted to use borrowed capital so as to make it earn at least the ordinary rate of interest, nor to pay interest out of their income, cannot borrow. Such men must pay an insurance against loss to the lender, and there is a general disinclination to lend to them at all. The element of risk of repayment as contributing to what is called the rate of interest is in general not sufficiently appreciated in the consideration of the subject. One who is familiar with the circumstances of borrowers throughout all parts of the United States cannot fail to conclude that high

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rates of interest are more immediately due to risk than to monopoly or to the relationship of local demand for loan capital to its supply. The Eastern lender wants a higher rate of interest in Kansas than in his own neighborhood, because he has never seen the security or because it is far away, and hence he has some distrust of it, for which he must be compensated.

III. *The Psychology of Interest.*

So much for the legal interpretation and practical working of usury laws. There now remains an analysis of the psychical character of interest, which has necessarily been indicated in the previous discussion. First, it is necessary to resolve what is commonly called interest — that which is represented by a rate — into its various components. The most essential element is the payment for the utility transferred to the borrower; this is the nucleus of the rate and may be its sole constituent. A second element often appears, namely, an addition for insurance against the loss of a portion or all of the principal. This is added, not in a well-defined percentage nor by a distinct estimate, but in a general way; and, if the true rate for insurance were to be ascertained statistically for a great number of loans within a large area of country, it is probable that it would be found to be less than the rate actually received by lenders who receive any at all, the reason being that in the absence of exact knowledge their risk is overestimated. A factor in this insurance rate is the concentration of risk. Where one person makes many loans, he feels that only a small proportion of them may be lost; but where there are many lenders, each making only a few loans, a single loss may represent a large fraction of the total amount lent by one individual, and this concentration of risk must be paid for. If this insurance element of the rate of interest is ever entirely absent, it is so in case of the "gilt-edge" securities, like the bonds of the United States. Finally there may be in the so-called rate of interest a third element, namely, a compensation for business — the labor, trouble and accompanying expenses of making loans, and the

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incidental loss of interest between repayment and relending. This distinctly appears in small loans on short time in comparison with large loans on long time.

The risk and business elements of the rate of interest are of considerable account in the rates paid in new communities for imported capital, but are of small consequence in old well-to-do communities possessing all the capital required for their own use. A full comparison of the East with the South and West cannot be made without bearing this in mind. The insurance and business elements of the *rate* of interest, therefore, should be eliminated in an examination of pure interest.

After excluding these two elements, what motives remain to support the contract for the payment of interest at all? Are they anything more than obedience to a custom or an unreasoned unwillingness to lend without interest? That interest is partly, at least, a matter of custom is shown by the mortgage statistics of the census. Its psychical character is revealed by the peculiarities of the rates. Fractions are relatively infrequent. When they occur, they are generally the simplest, namely one-half. And further, rates are much more largely represented by even than by odd numbers. The following table[1] gives the statistics on these points for 2,218,640 real estate mortgages in the states named:

States.	Percentage of Mortgages bearing Interest at Rates represented by		
	Whole numbers.	Mixed numbers with ½.	Even numbers.
Alabama	95.18	79.30	95.06
Illinois	98.81	60.92	72.81
Iowa	99.16	78.32	82.89
Kansas	99.20	97.78	71.41
Nebraska	97.71	86.22	77.57

The percentages in the first column are computed on the total number of mortgages; in the second column, on the total

[1] Extra Census Bulletins, No. 16 and No. 20.

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number of mortgages having rates represented by mixed numbers; in the third column, on the total number of mortgages having rates represented by whole numbers. It is remarkable that on January 1, 1892, all the usury laws in the Union fixed the maximum rate at an even number, except the law of Illinois, the National Currency Act, a corporation law of Massachusetts and a Pennsylvania law for agents. Although economic conditions have no doubt become adjusted to these peculiarities of the rate of interest, yet such peculiarities are evidently of psychic and not of economic origin.

But whatever the rate may be, still interest is paid; and for the reason, from a psychological point of view, that loans cannot be obtained without such payment. If a lender is approached by a man with the request for a loan without interest or with interest at a rate lower than the ordinary rate, the lender will not accommodate him. If one man will not pay interest, the multitude will, since it is economically possible to do so, because prices are so adjusted that they return to capital interest on itself. Under the present industrial and property systems wealth owners will not lend without interest. They will that interest shall be paid. Is the psychical antecedent of this anything more than the prospect that it will be paid? Or does the lender at least vaguely feel that interest is due to him for economic reasons? Is there any such economic warrant for including in the price of a pair of shoes the interest on the capital required to produce them, as there is for including the expense for labor or materials?

Widely divergent conclusions have lately been prominent in the study of the problem of interest. Professor Böhm-Bawerk's explanation that interest is due to "the increasing value of future goods as they ripen into present goods" is more especially inadequate when money loans are considered. To the money lender future wealth is worth more than present wealth, instead of less; his endeavor is to keep his loan wealth in the future and if he could not do this with interest he would do so by hoarding, although it may be admitted that he would save and hoard less wealth than he would save and lend. Money

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is deposited in banks without the return of interest to depositors that it may more safely be depended upon for some definite or indefinite use at some certain or uncertain time in the future. The $1,588,318,081 held on deposit by the 3677 national banks of the United States, mostly without interest to depositors, September 25, 1891,[1] testifies to the generally greater worth of future wealth than present wealth. The depositors are willing that others shall use this future wealth without the return of interest because they may at any time need to convert it into present wealth; but let this need become more remote or improbable — that is, let this wealth become less valuable as present wealth than it has been — and it is placed in the hands of borrowers at interest. The hundreds of millions of dollars placed at interest on Western real estate by Eastern lenders are worth more to the latter as future than as present wealth. A resident of the East, and doubtless of other parts of the country, may call to mind scores of acquaintances who would be sorely troubled if they could not let their money at interest; they desire to make their loan wealth future wealth, even independently of interest, and at the same time they receive interest for placing this wealth more certainly in the future. It is denying one of the plainest objects of acquisitiveness to deny that it works for the future.

To the borrower, on the other hand, borrowed wealth may be worth more as present than as future wealth, but in the large majority of cases, as the preceding table of objects of debt proves, he pays interest only to shift it upon final consumers or because it is only an equivalent of rental; and final consumers pay it because, if they were to refuse to do so, production would cease. Upon going back of the present and future goods theory we encounter the ultimate cause of interest — the unwillingness of wealth owners to produce and to lend without interest.

It may be, too, that to the lender the labor of producing surplus wealth above that which he wants to consume is greater in relation to its amount than the labor of producing that which he consumes — a principle strongly fortified by Professor Giddings —

[1] Report of the Comptroller of the Currency for 1891, vol. i, p. 123.

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but is this an antecedent of the extraction of interest in the mind of the lender? If not, then here is the legitimate effect of this economic warrant for interest entirely uncaused by the warrant itself.

As Professor Böhm-Bawerk maintains, the economic and psychical characters of interest are reconcilable with the explanation that it is an equivalent of rent and surplus value. Generally speaking, a person possessed of productive capital may employ it himself and obtain surplus value; or he may lend it, perhaps still obtaining all of the surplus value in the name of interest, but more probably sharing the surplus with the borrower. A study of the psychology of interest and surplus value leads to their identity; they found a place in economics because the acquisitiveness of man has created them and long custom has made them permanent. They were begotten at an early time, when loan wealth was scarce, products were few and extortion was easy, and their existence has continued because capitalists would not produce merely for the sake of earning salaries and the possessors of loan wealth would not lend with the return merely of the insurance against loss and of the compensation for the trouble of lending. They had it in their power to exact surplus value, rent and interest, and consumers, the enjoyers of final utilities and borrowers were willing to pay the exaction.

The view here taken may at first seem to justify the old opinion that interest is without ethical warrant, and it would be a justification of that opinion if the consequences of borrowing were left out of account. In a loan of wealth a utility is acquired by the borrower. It may have been a present actual utility in the hands of the lender or only a potential one or no present potential utility at all; it is sufficient that it becomes a utility in the hands of the borrower. Lenders have always perceived this prospective utility, but in taking advantage of it they are limited economically by the fact that interest must not raise the expense of production, in the long run, above the selling price of product, or create a burden too great to be borne by income, if the borrowed wealth is not used productively.

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Opinions may differ as to whether analysis and statistics show that debt is not prospectively an individual and social evil, in spite of the burden of interest; but it is certain that if borrowed wealth is to be used productively, the borrower intends to obtain from consumers the interest that is to be paid to the lender, by adding it to the price of product; and that if one pays interest on borrowed wealth not used productively, it is with the expectation that his income will sustain the payment. The plaint of the borrower is heard only when he cannot collect interest from consumers through the price of product nor pay it out of income.

Interest is conducive to social welfare because it permits and stimulates the saving of capital. Men would save and hoard, as squirrels do, if they could not make their wealth earn interest; but savings would be much less than they are, if the only motive were provision for "a rainy day" or the prospect of income from the management of a larger capital. Borrowing increases the amount of productive capital and enlarges the quality and variety of products, while increasing the opportunities and probably the earnings of labor. Before the practice of borrowing can be impeached, more must be known than is now known in regard to the character and tendency of the distribution of wealth, especially as influenced by interest. Through borrowing there is a distribution of the use and enjoyment of wealth among those who have not saved it, and the number of those who can take surplus value is thereby increased. If it is true that interest and surplus value are unearned gain, yet they have been and still are necessary inducements to the maintenance and development of industry in its many forms under a system of individualism.

A summary of the foregoing and some consequent conclusions may now be made. Whether interest has an economic or a psychical warrant, it appears to be established permanently in the present constitution of affairs. If it is justified economically, human nature practically demands it and agrees to its payment; and if it is not so justified, human nature equally demands it and agrees to pay. The experience of centuries

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testifies that it is better to borrow wisely according to the needs and abilities of the borrowing members of society than not to borrow at all.

But the participants in a loan transaction commonly do not stand on an equal footing with each other. On the part of a borrower who is in a situation, for instance, where if he does not renew a debt or obtain an advance of farm supplies, he must lose some or all of the wealth he has saved, there is a mental operation, more or less wisely performed, in which he weighs the prospective loss against an exorbitant rate of interest which a lender may perchance exact if he has no competition. It will not do to say that the debtor is free to borrow or not to borrow, as he pleases; while this accords with the physical fact, it does not accord with the psychical fact. The psychical necessity of borrowing to avoid a greater evil is much stronger than that of borrowing to improve a condition that is not especially painful and not likely to become worse. In the latter case, furthermore, he can take his time and await his opportunities, while in the former immediate decision is imperative. Where lenders take advantage of the necessities of borrowers, the circumstances are such as to prevent the latter from dealing with the former with equal influence upon the bargain; there is no practical escape from these necessities, except what is afforded by borrowing, and the lender's wealth, unlike labor and goods, can be kept in the form of money without expense or loss and need not be lent; yet this cannot be said without some qualification, because lenders have to some extent become dependent upon borrowers for the sake of income. The borrower cannot wait until the local money market shall be supplied by so many lenders that any one of them will be glad to lend to him at a reasonable rate of interest; but such delay is practically his only remedy in the regions where usury is frequent. The general welfare demands at least that one individual shall not use his advantage over another individual, when that advantage is not due to personal superiority and when its exercise does not promote such superiority in its possessor. Excessive interest is obtained through

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monopoly, just as excessive freight charges are obtained, or excessive telephone rentals, or prices for gas. The defensible object of usury laws is to prevent the exercise of an unfair and unmerited advantage by one person over another.

Although these laws, being usually penal in their nature, are to be strictly construed, no reproach can be brought against the courts in regard to their interpretation and enforcement. Whatever legal responsibility there may be for the failure of usury laws rests with legislatures. Interest is so bound up with the risk and the business trouble and cost of lending that the practical difficulty of legislating, even by unprejudiced men, so as to protect borrowers without injuring them is greater than appears on superficial examination. If the highest legal rate of interest is, say, ten per cent and the rate ordinarily agreed upon is eight per cent, a person in whose case the risk of lending calls for a rate of twelve per cent cannot borrow, let his need be ever so urgent; or the lender must be willing to violate the law, in which event he will want to be paid for the risk of violation and may want fourteen per cent or more. So far as risk is a part of the rate of interest and calls for a rate higher than the law allows, the object of the law cannot be accomplished; loans cannot be obtained within the legal limit, if interest and risk exceed it, and men desiring to borrow are made to suffer, whether they borrow or not. The same conclusion may be applicable in a measure to the cost and trouble of lending, under the law as it exists in Nebraska and North Dakota. In the other states charges on this account are legally collected, although at times and in some regions they have been exorbitant. There seems to be no practical way to adapt usury laws to the risk element of the rate of interest, on account of the difficulty of determining in any specific case how much of the rate belongs to interest and how much to risk.

While, to some extent, borrowers appeal to usury laws to modify or avoid their contracts and to inflict penalties, if there are any, the general testimony of observers is that to a much greater extent these laws are a dead letter in the communities where there are opportunities to violate them; that is, for every

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case in court there are many violations that never go into court. Yet, throughout the regions containing most of the population of the country, at the present time, violations are relatively few, because the opportunities to violate are relatively few, taking the whole number of loans into account. This somewhat depends upon where the legislature has drawn the line. If it is drawn too low, the law will be violated or many would-be borrowers must suffer. Once in a while a legislature has avowedly undertaken to lower the rate of interest below the ordinary rate prevailing in the state, but the presumption is that these attempts were unsuccessful; certainly it would greatly damage the interests of the people of any state making the attempt at the present time, by keeping out foreign capital and by driving out domestic capital.

Leaving out of account the risk that may be involved, observers agree that the necessities of borrowers are not taken advantage of, law or no law, in communities where loan capital is plenty. In communities where it is scarce, advantage of their necessities has been taken with little or no appeal to the law, and, as far as positive conduct goes, usury laws appear to be ineffective. But how far abstention from taking advantage of borrowers' necessities has been due to fear of the penalty of the law, cannot be demonstrated and is mostly beyond observation. There would be some ground for believing in the deterrent effect of the penalty, if a community could be found in which, while the highest legal rate of interest should be not much above a reasonable interest rate plus ordinary risk and business elements, lending should be without competition and the rate of interest should be reasonable when compared with the prices of products and the earnings of borrowers. The general mildness or absence of penalty for violating the usury laws, throughout the states, indicates that these laws do not have much deterrent effect. While it is desirable that lenders shall not be allowed to force borrowers to decide between the suffering of a loss or sacrifice and the payment of excessive interest, yet it is indicated both by the evidence of facts and by psychical analysis and deduction that laws intended to prevent this have not had a large measure of suc-

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cess; and at the same time it is now beginning to be known that, all associated elements of the rate of interest being taken into account and the prices of products and all else being considered, by far the principal proportion of the loans made in the United States are subject to no usurious or unreasonable rates of interest. What the law has for some centuries undertaken to accomplish has now been nearly accomplished, not appreciably by law, but by the production and saving of wealth.

GEORGE K. HOLMES.

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THE CONTROL OF NATIONAL EXPENDITURES.

A DIFFERENT VIEW.[1]

THE expenditures of our national government are primarily under the control of Congress. No money can be drawn from the Treasury except in pursuance of an appropriation by law.[2] But when an appropriation has been made, all further direct control of the money passes from Congress to the executive officers of the government. Within the limits of the appropriation acts, which are in many cases very broad, the amount and the particular character of the expenditures are left to the discretion of the heads of departments or, more generally, to some one of their thousands of subordinates. In the exercise of its control Congress has pursued the policy of making separate appropriations for particular objects, subdividing and particularizing those objects more and more from year to year, and restricting them to specified classes of items with increasing minuteness. During the fiscal year 1891 there were over two thousand appropriations, counting by titles alone, made by Congress, ranging from a few dollars to $94,590,761 (for army pensions); and many of these appropriations embraced numerous subdivisions, each of which constituted a distinct appropriation.[3]

[1] *Cf.* the article by E. I. Renick in the POLITICAL SCIENCE QUARTERLY for June, 1891.

[2] Constitution of United States, art. i, sec. 9.

[3] This subdivision and specification, however, is carried out with a very unsteady hand. For example, the appropriation for contingent expenses of the Treasury Department (amounting to one hundred thousand dollars) is subdivided into fourteen distinct appropriations, as follows: for stationery, for postage, for newspapers, books, *etc.*, for travelling expenses, for freight, *etc.*, for rent, for horses and wagons, for ice, for file holders, *etc.*, for fuel, for lights, for carpets, *etc.*, for furniture and for miscellaneous; and the last of these items is specified thus minutely: for washing and hemming towels, for the purchase of awnings and fixtures, window-shades and fixtures, alcohol, benzine, turpentine, varnish, baskets, belting, bellows, bowls, brooms, buckets, brushes, canvas, crash, cloth, chamois-skins, cotton-waste, door and window fasteners, dusters, flower-garden, street and engine hose, lace-leather, lye, nails, oil, plants, picks, pitchers, powders, stencil-plates, hand-stamps and repairs of same, stamp-ink, spittoons, soap, matches, match-safes, sponge, tacks, traps, thermometers,

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How is Congress to see that even the broad lines laid down in the appropriation bills are followed? How is it to know that the moneys which it authorizes to be used for particular objects are applied to those objects and not to others? Those who are familiar with the interpretation and application of laws by administrative officers know the insuperable difficulties with which Congress has to contend.

From an early day in the history of our government, Congress has endeavored to prevent the misapplication of moneys appropriated. Aided by the suggestions and recommendations of eminent Secretaries of the Treasury, it has enacted a series of laws which, even under existing circumstances, have operated to check the constant tendency of administrative officers to spend the public moneys with a free hand.[1] But the embarrassment under which it labors is, that it has not the direct power to enforce its commands. Congress may make restrictions, may prescribe rules, may say what shall and what shall not be done; but laws do not execute themselves. It may declare that money shall not be used for any other than specified objects, but it cannot be present when the payments are made; it may lay upon administrative officers minute and specific restrictions, but it cannot stand guard over them to see that its commands are faithfully observed. With all its great and various powers, it is under certain practical limitations; and in matters connected with expenditures it is at the mercy of administrative officers. Congress has been aware of its own weakness in the control of expenditures, but it has apparently failed to perceive

tools, towels, towel-racks, tumblers, wire, zinc, and for blacksmithing, repairs of machinery, removal of rubbish, sharpening tools, advertising for proposals, and for sales at public auction in Washington, District of Columbia, of condemned property belonging to the Treasury Department, payment of auctioneer fees, and purchase of other absolutely necessary articles, ten thousand dollars. Act of July 11, 1890.

On the other hand, the permanent appropriation of $5,500,000 annually for collecting the customs revenue is granted without any restriction as to items of expenditure, thus: There is appropriated, *etc.*, "the sum of two million seven hundred and fifty thousand dollars for the expenses of collecting the revenue from customs for each half year." Sec. 3687, Rev. Stat.

[1] See Rev. Stat. secs. 3648, 3678, 3679, 3682, 3690, 3709, 3732, 3733, 3735 and 5503; Stat. at Large, 18, 110 and 22, 255.

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the value of the aid it might derive from the accounting officers, if they were properly equipped and sustained.

To secure a proper control over the national expenditures the following requisites are indispensable:

1. Full and carefully prepared estimates of the amounts needed by the various branches of the public service, specifying in detail the items upon which each amount is estimated.

2. The publication of such estimates, when revised by Congress, as explanatory of the appropriations and as a guide to their application.

3. The restriction of expenditures to objects which are necessary for the public service, and to the purchase at just and reasonable prices, of articles of a suitable and appropriate character, not extravagant or luxurious.

4. A strict accounting for moneys drawn from the Treasury, and the withholding of credit for any item of expenditure until it is clearly and satisfactorily shown that all material requirements of law affecting its validity have been fairly and substantially complied with.

It will be readily seen that only the first and second of the above four requisites are within the immediate control of Congress, and even these not entirely. Congress may of course require such estimates to be furnished as the basis of its grants of money, but their accuracy, their conformity to fact, is in the keeping of a thousand administrative officers, whose carefulness, thoroughness and fidelity are prime factors in the computation; and it is doubtful if the estimates submitted will ever be brought very near the proper standard, unless a more discriminating scrutiny is given to them by Congress and a stricter compliance with proper requirements exacted. Almost every branch of the public service, however small, is disposed to magnify its own importance; and nearly every administrative officer who is entrusted with public expenditures is inclined to enlarge his discretion and power and to increase the amount of public money at his disposal. Hence the greatest difficulty in securing trustworthy estimates.

The third requisite (inhibiting unnecessary, wasteful and ex-

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travagant expenditures) must necessarily be confided to administrative offices, and only partial supervision of their discretion can be wisely assumed by Congress. A careful consideration of the fourth requisite (that of exacting a strict accountability for expenditures and a compliance with law) will clearly show that if Congress should ever seriously contemplate the actual enforcement of the prohibitions and limitations and restrictions which it capriciously imposes upon appropriations, the most effectual method of accomplishing its purpose would be to strengthen and sustain the accounting offices in their proper functions. In this way, and in this way only, can its control over expenditures be made in any degree real. Fully to accomplish this purpose, the accounting offices should be carefully reorganized and consolidated, and given the character of an independent semi-judicial tribunal.

The accounting offices are the principal safeguard provided by law for the protection of the Treasury. All revenues collected and all expenditures made by the government must be accounted for to them. The ordinary expenditures exceed $250,000,000 annually,[1] which are incurred and paid through the agency of many thousands of public officials, whose accounts it is the duty of the accounting officers to examine and certify. These officers are also required to examine and certify for payment numerous claims growing out of the various transactions in the several departments of the public service. But an examination of the organization and methods of procedure under the existing system discloses a number of conditions which impair its efficiency and consequently its value as an aid to Congress.

This system comprises eleven distinct offices, namely, the first, second, third, fourth, fifth and sixth auditors; the commissioner of the general land office, who is an auditor as to accounts pertaining to the public lands; the first and second comptrollers; the commissioner of customs, who is in fact a comptroller; and the register. These offices are organized in

[1] The expenditures for the fiscal year 1890 were $358,618,584.52. Finance Report, 1890, p. xxi.

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four co-ordinate branches, each of which has a separate jurisdiction and is independent of the others. In general, accounts are first examined and certified by an auditor, and then re-examined and certified by a comptroller.[1] It will be understood, however, that the accounts are not examined by the auditors and comptrollers in person; that would be a physical impossibility. The examinations are made by their clerks, who are expected to scrutinize every item and voucher in the vast aggregate of claims and accounts, to verify the computations and ascertain the validity of the expenditures, and, if found correct in every particular, to "pass" them. Certificates of the amounts or balances found due are then submitted to the auditor or comptroller, by whom they are in general signed *pro forma*. But if in the course of such examination a clerk is in doubt as to the validity of any expenditure, he may submit it for instructions to the chief of his division or to the head of the office. New and important questions of law are generally decided by the latter officer. It is obvious, however, that to enable an auditor or comptroller to exercise this function, the validity of an expenditure must be first called in question by the examining clerk and be by him submitted for decision.

The Secretary of the Treasury, in his report of December 3, 1855, says of the accounting officers:

> In the extension of the business of accounting, the examination of the accounts stated in the first instance by the auditor, and then by the comptroller on appeal, has in many cases been omitted, the auditor and comptroller signing their names on the faith of the account stated by their respective accountants, thus opening the door and increasing the chances of departure from correct principles in the action of the department. . . . To constitute a good auditor and a good comptroller requires legal ability of a high order, a special knowledge of our fiscal and disbursement laws and regulations, coupled with unabating industry, unbending integrity and promptitude of decision; and scarcely less can be required of the accountants in their offices. The auditors and comptrollers, and the accountants under them, constitute the safe-

[1] Many classes of accounts also undergo a preliminary examination in the various administrative offices before they are sent to the accounting offices.

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guard of the national Treasury, and have to withstand the whole army of claimants and their interested clamor.

Responsibility for the proper examination of the public accounts is thus seen to rest primarily upon the clerks by whom the examinations are actually made. To discharge their duties efficiently, they must be familiar with the laws relating to the expenditures under examination by them, with the decisions of the courts and with the principles for construing statutes; and to render their work reliable, it is indispensable that it should be performed with scrupulous care, thoroughness and fidelity. Nothing is easier than to slight such examinations, and the probability of detection is very remote; for all accounts, whether once hastily examined or twice hastily examined, and certified *pro forma*, are quietly deposited in the oblivion of the "files."

The Secretary of the Treasury, in his report of December 1, 1879, said of the Treasury Department:

> The organization of the several bureaus is such, and the system of accounting so perfect, that the financial transactions of the government during the past two years, aggregating $3,354,345,040.53, have been adjusted without question, with the exception of a few small balances now in the process of collection, of which it is believed the government will eventually lose less than $13,000. [Page xliv.]

But is not such a result what would be expected if accounts were carelessly examined? It must be apparent, even to one who is not an accountant, that if disallowances are sparingly made and improper expenditures passed without question, the balances found due are likely to be small. There is no great efficacy in a system of double examinations, if neither of them is carefully made; and the existing system is without adequate provision for fixing upon the proper persons the responsibility for failure in the discharge of their duties. It may also be noticed that by reason of the subdivision of the accounting offices into four co-ordinate and independent branches, there results a lack of uniformity in their decisions, so that there is one law for the settlement of the accounts of one officer

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and another law for the settlement of those of another. From the same cause payments are frequently made through one office to officers or agents who are indebted upon accounts settled in another. And no adequate check exists for preventing the payment of additional and double compensation in contravention of law.

Under existing law the accounting offices take jurisdiction of all claims against the United States, whether liquidated or unliquidated, and without limitation as to the time when they first accrued. Such claims are presented for settlement upon evidence furnished by the interested parties or their attorneys, and are nearly always pressed for immediate payment. In respect to long accrued and unliquidated claims, questions of fact necessarily arise, for the proper investigation of which the method of procedure in the accounting offices is manifestly inadequate. Such investigations require the examination of witnesses under oath and some means of testing the sufficiency and credibility of their testimony. But the accounting officers rely entirely upon *ex parte* affidavits and the unverified reports and certificates of officers, which are often based upon the representations of interested persons. The adjudication by the accounting offices of these, the most dangerous classes of claims, is thus effected without those safeguards which are deemed indispensable in all courts.[1]

Many of these claims are urged upon the accounting offices by prominent and influential public men. This is more likely to be the case with claims of doubtful legality, for such alone need persuasive aid. Under their existing uncertain tenure the accounting officers are prompted by personal interest to avoid incurring the displeasure of such influential persons. In many ways this condition tends to destroy that unswerving independence which is essential to the proper discharge of their judicial functions. It leads to a weak and time-serving course;

[1] The attention of Congress was called to this subject by Secretary Sherman in his report of Dec. 21, 1878. For an able argument that it was not the intention of Congress to give the accounting officers jurisdiction of unliquidated claims, see POLITICAL SCIENCE QUARTERLY, VI, 248 (June, 1891), pp. 269–270.

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to a lax and latitudinarian construction of appropriations in favor of pressing claimants; to the non-enforcement of salutary laws; to the misapplication of appropriations; and to the breaking down of the barriers provided by law for the protection of the Treasury.

The need of legislative provision against the misapplication of the public moneys was suggested by the Secretary of the Treasury in his notes upon the first message of President Jefferson. He said:

> There is but one subject not mentioned in the message which I feel extremely anxious to see recommended. It is, generally, that Congress should adopt such measures as will effectually guard against the misapplication of public moneys, by making specific appropriations whenever practicable; by providing against the application of moneys drawn from the Treasury, under an appropriation, to any other object or to any greater amount than that for which they have been drawn; by limiting discretionary powers in the application of that money, whether by heads of departments or by any other agents; and by rendering every person who receives public moneys from the Treasury as immediately, promptly and effectually accountable to the accounting officer (the comptroller) as practicable. The great characteristic, the flagrant vice, of the late administration has been total disregard of laws, and application of public moneys by the departments to objects for which they were not appropriated.[1]

The needed legislation was liberally supplied by Congress, but the "flagrant vice," the "disregard of laws," could not be eradicated by merely restrictive legislation. Such restrictions are not more inviolable than other laws, and may be disregarded with similar impunity. In disbursing public moneys an administrative officer is not under the surveillance of Congress, and if he ignores or evades or sets aside a provision which hampers him, what does it signify? The money is spent and the world jogs on! By adopting a loose or erroneous construction, he may frustrate or nullify or contravene a law, or he may be wholly ignorant of its existence, and go about his business as if the law were not. What check is there upon him? Undoubtedly the most effectual check is to be found in requiring a strict accountability according to law. But what if accounting officers are

[1] Writings of Gallatin, Henry Adams, vol. i, p. 68.

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lax, or their clerks are negligent! They, too, have power to ignore or to construe liberally or to pass without question accounts which simulate a compliance with law. Where, then, is the remedy?

There are no positive means of preventing such abuses. In the last resort, the functions of government must depend for their just and proper exercise upon the character of the officers to whom they are intrusted. But that something can be done to lessen such evils cannot be doubted. The difference in the character of two such bodies as the United States Supreme Court and the Board of Aldermen of New York City is an example of the effects of different conditions. The removal, as far as possible, of the perverting influences of self-interest must be the principal remedial measure.

The vast powers and delicate functions of the accounting officers indicate the importance of surrounding them with the best practical safeguards. That there should be great care exercised in their selection may be taken for granted. That their tenure should be secure from the assaults of interested claimants and delinquents, may be considered equally manifest. The present civil service law, while looking in this direction, goes only a little way. It throws its protecting ægis over the clerks only, and but partially and imperfectly over them; for among them a class which needs its protection most urgently is now left to bear the brunt of the affray and is slaughtered without mercy. When the Treasury Department was reorganized in 1875,[1] chiefs of division were established in the various offices, it being the intention that these chiefs should be selected from the principal clerks, who by reason of their knowledge, experience and special training would be well qualified to superintend and direct the other clerks in the discharge of their duties. From what has been said of the importance of the duties of the clerks in the accounting offices, it will be obvious that this was a judicious and admirable provision. Moreover, it offered a goal for the commendable ambition of meritorious clerks, and encouraged fidelity and proficiency. But the rules adopted by the

[1] Act of March 3, 1875, 18 Stat. 396.

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Civil Service Commission most inexcusably excepted such chiefs of division from examination.[1] The effect of this injudicious concession to the patronage system has been to permit those important positions to be filled with inexperienced and merely nominal chiefs, incompetent to instruct and direct their trained subordinates. The rule thus operates in practice as a bar to the promotion of even the most worthy and meritorious clerks; for, being the only important positions in the department at Washington which are in the free gift of the secretary, they are regarded as choice plums to be exchanged for reciprocal favors, past or prospective, and they command a price in "influence" which is beyond the reach of a department clerk. That such a policy tends to discourage the best clerks and to demoralize the whole service, hardly needs to be suggested. This egregious mistake of the Civil Service Commission offsets about all the benefit the accounting offices derive from the law.[2]

But the accounting system itself needs an overhauling. To secure the results which an intelligent nation should insist upon having, the accounting offices ought to be thoroughly reorganized and made independent of all administrative control. For this purpose a separate department should be established, having for its sole function the settlement of the public accounts. Such a department might appropriately be called the Department of Audit, and should embrace all the offices employed in the adjustment and registry of those accounts. By dispensing in great measure with the system of double examinations, and by consolidating the small offices, the eleven offices into which this branch of the service is at present divided could with advantage be reduced to six, and the four co-ordinate divisions combined in one unified system. The six offices suggested are those of a comptroller and head of the department, who might be appropriately called the auditor-general; a first, second, third, and fourth auditor; and a register.[3] Each of these officers

[1] Civil Service Rules, xix.

[2] [*Cf.* POLITICAL SCIENCE QUARTERLY, III, 279 (June, 1888).— EDS.]

[3] It is suggested by Mr. Renick in this QUARTERLY for June, 1891, p. 269, that there should be an auditor for each department. But this would require eight auditors, and the amount of work to be done by some of them would be trifling. Thus, for

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should be provided with a deputy and, except the register, with a corps of trained examiners. The jurisdiction of the department should be so restricted as to exclude all claims not authorized by law, all unliquidated claims and all claims which should not be presented to the department for adjudication within five years from the date when they first accrued.

It is not necessary to indicate in detail all the duties which should be prescribed for these officers. One suggestion, however, may be made. Only the more important duties of the principal officers are prescribed by existing law. There are strong reasons for extending such legislative direction to the minor officers or examiners. As has been pointed out, the responsi-

settling the accounts of the Department of Justice only ten or twelve clerks would be required; for the Department of State, six or seven; for the Department of Agriculture, four or five; while the War Department would require 390 and the Post-Office 412.

The suggestion is also made (p. 272) that each auditor should be his own register and collect the outstanding balances arising in his office. It frequently happens that an officer is indebted on accounts settled by one auditor, and entitled to payment on accounts settled by another. If all balances were registered in a central office, a settlement would be made in such case by a transfer; but without such a central office, payment would be made to the officer by one auditor and suit brought against him by the other.

It is further suggested (pp. 279, 280) that disbursing officers be exempted from responsibility, but be compelled to refer to the accounting officers, for adjustment before payment, all demands of a doubtful nature. There is undoubtedly a difficulty in dealing with disbursing officers who pay out money on the orders of their superiors. When payments are so made which are unauthorized by law, it is a hardship to charge them against the innocent disbursing officer; but if this is not done, the law may be violated with impunity. How can he be compelled to refer doubtful cases to the accounting offices? He may have no doubt; he may be ignorant of some law or of its proper construction, or careless in his examination of the question. If he pays out the money and is relieved of responsibility, is not that the end of it? To avoid such a result it would be necessary to put all disbursing officers under the control of the accounting officers. If this could be done, it would be a most admirable arrangement. But under our system nearly all disbursing officers are also administrative officers, and as such, they are necessarily under the control of the heads of the various departments. They embrace officers of the army and navy, collectors of customs and internal revenue, superintendents of life-saving stations, postmasters, marshals, receivers of land offices, *etc.* To hold these officers to a strict accountability is the only safeguard of the Treasury. But in cases of hardship, where money has been paid out in good faith in obedience to an order of the head of a department, the facts should be reported to Congress for an act for the relief of the disbursing officer. Congress would thus be advised, and the necessity of its sanction would operate as a salutary check.

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bility for the efficiency of the examinations rests primarily upon the clerks by whom the examinations are actually made, and it is important that their duties should be defined and guarded by express statutory provisions. For example, accounts for expenditures aggregating many hundred thousands of dollars have been known to be passed by unscrupulous clerks and certified *pro forma* by unsuspecting accounting officers, without a single voucher having been examined, — in fact, without the bundles having been untied.

The duties of the auditors would not require modification, except in some matters of detail; but the proposed change in their relation to the system would increase their responsibilities and assimilate their functions very nearly to those of the present comptrollers.

In view of the enlarged jurisdiction of the auditor-general, who would take the place of the three comptrollers of the present system, it would probably be necessary to diminish the magnitude of the duties which would otherwise devolve upon him. This could be advantageously effected by relieving him of the duties of keeping appropriation ledgers and countersigning warrants for moneys covered into the Treasury (which duties should be assigned to the register), and by dispensing in great part with the double examination of accounts. Thus, it would seem expedient to make it the duty of the auditor-general to superintend the examination of all claims for moneys to be paid out of the Treasury; but as to disbursing officers' accounts, he should be required to examine only such as he should deem necessary, either for the purpose of verifying any balances which he might question, or of ascertaining the efficiency of the examinations made under the supervision of the auditors. This would relieve him of much unnecessary labor, and at the same time he would be enabled to ascertain the degree of efficiency of such examinations, and, as head of the department, to take such action as should be necessary for maintaining the proper standard.

It would also be expedient to restrict his power in the allowance of claims. This would be partially effected by the pro-

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posed limitation of the jurisdiction of the department. As a further restriction he should be denied authority to certify a larger amount due a claimant than that found due by the auditor who certified the claim, except upon appeal. Provision should be made for such appeals, to what in judicial phrase might be termed a full bench. For this purpose the auditor-general and the four auditors should be constituted a board of audit and review, which should be convoked from time to time by the auditor-general for the purpose of re-examining claims and accounts upon appeal, and also of considering questions of law arising in the examinations in respect to which the auditor-general or an auditor should be in doubt.

Such a council would also serve another important purpose. The accounting officers now stand alone and derive little or no support from one another. In the decision of questions of law concerning which a comptroller is not entirely free from doubt, it is only natural that he should hesitate to oppose his single judgment to arguments and opinions often forcibly presented by able attorneys. Especially is this true in cases which involve large private interests, or in which the enforcement of the law would cause a personal hardship. Such cases seem to justify a relaxation of the hard lines of the statute and the exercise of discretionary power. But when this path is once entered upon the descent is easy, and the Treasury is without protection. On the other hand, if such sympathetic appeals are denied, the comptroller will be stigmatized as technical, arbitrary and narrow-minded. To the strong the task is thankless; to the weak it is perilous. By providing for consultations on doubtful questions of law and for united action upon appeal, it is believed that the accounting officers would receive aid from one another, and that they would derive a support and strength from the unity of the system which would relieve them from personal opprobrium and enable them to withstand the demoralizing tendency of extraneous pressure.

The proposition to separate the accounting officers from the Treasury and to establish a new department will no doubt meet with objection. Things with which we have long been familiar

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are apt to be regarded as proper and even necessary, and we are disposed to question any change. The relation of the accounting offices to the Treasury, however, is merely one of aggregation. In the rapid growth of the executive departments such aggregations become from time to time excessive, and require cutting down. The Departments of Agriculture, of Justice and of the Interior are prominent examples of this wholesome pruning and transplantation.

It may be said that the evils attending the present system have been due to the bad or weak men who have been entrusted with its responsible duties, not to the system itself, and that with good men it would prove satisfactory. But neither a good system and bad men, nor a bad system and good men, meet the requirements of the present day; and a strong objection to the existing organization is that it tends to make men bad — that it destroys that independence and dauntless rectitude which are indispensable to the proper exercise of the judicial functions of the accounting officers.

It is not apparent in what manner the supervision of the settlement of the public accounts can be beneficially exercised by the Secretary of the Treasury, and such supervision is repugnant to the proper discharge of those duties by the accounting officers. It would be manifestly improper to authorize officers and agents entrusted with the collection or disbursement of public moneys to settle their own accounts. It is equally a sound principle that no department having control of public revenues or expenditures should also have control of the settlement of the accounts therefor.

It is the theory, and a wise one, upon which the final adjustment and settlement of accounts in the Treasury Department is founded, that the officers who pass upon them shall be wholly distinct from those who expend the money or incur the liabilities.[1]

There does not appear to be any satisfactory reason for making an exception to this principle in the case of the Treasury Department. If it should be said that the Secretary of the

[1] Chief Justice Richardson, in Waters' Case, 21 Ct. Cl. 30, 38.

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Treasury, as the fiscal agent of the government, is more directly interested than the heads of other departments in the strict accountability of all officers and agents who are entrusted with public moneys, it must be answered that the most effectual method of securing such accountability is to strengthen the accounting officers in the proper discharge of their duties, and to remove those conditions which imperil their judicial independence and weaken their power.[1]

Upon the practical ground of economy it is desirable that the accounting offices should be organized as a separate department reporting directly to Congress, and should be made independent of extraneous influences. With such an instrumentality to supplement its powers, Congress would be no longer embarrassed in controlling the public expenditures by its inability to enforce its enactments restricting the use of appropriations. A general sense of public right and justice also urges the change.[2]

NILES HIBBARD THOMPSON.

[1] In his report "On Simplifying the System of Public Accounts," Peter G. Washington makes the pertinent remark: "His [the secretary's] preliminary order to pay the money forecloses his subsequent judgment as to its legality." Ex. Doc. No. 71, 24th Congress, 2d sess. Secretary Woodbury, in a report to the Senate in December, 1834, said: "It is manifest that no effectual check can ever exist in any case where the same officer authorizes the expenditure and audits or controls the audit of the accounts." Senate Doc. No. 6, 23d Congress, 2d sess. p. 5.

[2] It may be thought that the foregoing criticism of the existing accounting system dwells too exclusively upon its defects. Some features of the system are undoubtedly praiseworthy, and much might be justly said of many able and highly honorable men who have served as comptrollers and secretaries of the Treasury. The system would be intolerable if this were not true; but to expatiate on those features would be unprofitable.

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THE ENGLISH CROWN AS AN AID TO DEMOCRACY.

IT is not many months since an editorial in *The Times* (London) declared democracy to be king in England now; and a writer in the *Edinburgh Review* for July, 1890, says:

> Parliament is king; it is the modern embodiment of the power of the nation; internal attempts to deprive it of its strength are aimed against that very sovereignty of the people which it is the boast of our reformers to have established on a truly democratic basis.[1]

It is scarcely twenty-five years since Mr. Bagehot's remarkable book on the *English Constitution* was first published, yet the parts of the book which set forth the dangers of a democracy under the English form of government are strangely out of harmony with current political literature. The test which Mr. Bagehot feared the cabinet system would not stand is being applied. The English parties are bidding for the laboring man's vote. For better or for worse England is in the midst of a great democratic experiment.

Professor Bryce has discovered in the extreme caution shown in our constitution-builders traces of the Puritan belief in original sin.[2] They did not put confidence in man. They sought to hedge him about with a multitude of restrictions. This evidence of a belief in original sin does not, with us, seem to grow less. One of the chief objects of our written constitutions is to prevent the officers of government from doing mischief. There is a tendency to multiply these restrictions rather than to diminish them. We believe in democracy as much as any people, but we have our own way of expressing it. None of us knows exactly what is meant in the tenth amendment where it

[1] Article entitled "House of Commons Foiled," p. 287.
[2] The American Commonwealth, I, 299.

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speaks of reserving powers to the people; yet we think that in some way there is a deal of sound philosophy in it. There are many things which we do not intend that either our state or our general government shall do or try to do, and we say so in black and white in our written constitutions. Democracy with us is too sacred a thing to be intrusted to anybody. The English democracy is not thus limited or protected. The democratic theory of the English constitution requires that all power should be centralized in the cabinet and the House of Commons. In so far as the English constitution is really democratic, the power to check the House of Commons is taken away from the House of Lords, from the crown and from the courts. If we in America should abolish our state governments, our written constitutions, our independent executive and our federal Senate, and then centralize in the House of Representatives all the powers of government, we should have a constitution such as the extreme democrat in England looks upon as desirable. The English constitution has not quite attained unto this extreme form of unrestrained democracy, yet it has come very near it.

The English people have never consciously adopted a democratic form of government. The form of democracy which they now have has been generated by many forces, some of which have been operating for ages. It is difficult to see how the English constitution could be reduced to definite legal form and adopted, in the American sense, without at the same time giving rise to a multitude of restrictions upon the officers of the government. Certainly there is no reason to believe that the English people or any other people would have deliberately adopted the unrestrained democracy which they now enjoy. The question naturally arises, how then did they come to have such a government? Without attempting to give a complete answer to this question, important light may be thrown upon it by noticing the contributions to this end which have been made and are now being made by the crown.

It is chiefly owing to the peculiar position of the crown that the English constitution has not been committed to writing; that it has been left as a body of customs and indefinite under-

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standings. According to the forms of English law the entire government is built up around the throne. The monarch is the source of law. The Parliament is the king's high court for legislation. The courts of law are his courts. The administrative officers are his ministers. There never was a time when some of these forms of law did not represent as true things which were not true. Yet at all times the position of the crown and the other effective forces in the government have been such that these forms of law have been preserved unchanged. When one law squarely contradicts another law it is exceedingly inconvenient to commit them both to writing. If both are committed to writing, one of them is destroyed, or a manifest absurdity is committed. Yet a form of law may be traversed and nullified by an understanding without inconvenience and without apparent absurdity. A matter-of-fact American is sure to be astonished when he reads *Magna Carta* for the first time. In legal form this instrument expresses the gracious will of the king. It is the king who is represented as preternaturally anxious about the liberties of the people. The king enjoins the appointment of the four-and-twenty barons, and directs them to make war upon him and compel him to obey the charter; and the king is even made to say that in case some of his subjects would not of their own accord join the barons in making war upon him, he would order them to do so. This passage in *Magna Carta* may serve to illustrate the absurdities which would appear in English law if the understandings of the constitution should be reduced to written form and enacted into law. The makers of *Magna Carta* lived long before the more refined method of amending the English constitution had been perfected. The modern way is either to traverse the forms of law by an understanding, or, if the form is made void by actual law which the courts enforce, to take care that an appearance of consistency is secured. I do not intend to hold that the crown has been an active force in securing the unwritten character of the constitution, but simply that the forms of law, the unwritten constitution and the unrestrained democracy are correlated facts.

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The relation of the crown to the actual growth of democracy in the present century has become much more close and intimate. When the first great reform was carried, in 1832, it was the king who overcame the resistance of the House of Lords, by giving to the prime minister a written statement that if the Lords refused to pass the bill he would create enough new peers to carry the measure. Aware of this threat, they yielded. This act has been made the basis of a new understanding in the constitution, and has ever since gone far to control the action of Parliament. Under this modern idea, the House of Lords has no right to refuse assent to any measure which the people and the House of Commons unite in demanding. It is now one of the commonplaces of the constitution that if the people wish to abolish the House of Lords they may do so. The method of accomplishing this is made clear by the act of the king in 1832. It is the fact that the hand of the Lords may thus be forced that has made it possible to carry the recent democratic reforms.

Mr. Bagehot names a multitude of high-handed acts of government which the monarch may do without consulting Parliament. The following is the oft-quoted passage:

> When the queen abolished purchase in the army by an act of prerogative (after the Lords had rejected the bill for doing so), there was great and general astonishment. But this is nothing to what the queen may by law do without consulting Parliament. Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the general commander-in-chief down; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male and female, a peer; she could pardon all offenders.[1]

It is decidedly puzzling to an American to be told that these royal prerogatives exist in an extreme form of democracy, and

[1] The English Constitution, p. 32.

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still more puzzling to be told that these are important factors in the attainment of democracy. Yet both these propositions are made clear in recent works on the English constitution. Instead of the twenty-four barons of *Magna Carta* to compel the monarch to do right, there is the thoroughly established principle of the constitution that every royal act which can affect the rights of the citizen or the well-being of the nation must bear the name of a minister; it must be advised by a minister, and the minister is held responsible for the act. That ancient legal phrase, "the king can do no wrong," which had its origin with the notion that the king, being the source of law, was above the law, is now made to mean that the king in his own name can do nothing at all. For every wrong done by the executive, a minister may be punished.

Professor Dicey, in his recent book on *The Law of the Constitution*,[1] makes it clear that royal prerogative is now an important democratic force. The principle of ministerial responsibility gives the power of the crown to the ministers. So long as the influence of the monarch enabled him to determine who should be his ministers, royal prerogative did strengthen the crown. During that time in English history in which the influence of the Lords was a determining factor in choosing and dismissing ministers, royal prerogative increased the power of the Lords. Now, since the House of Commons and the voters determine who shall be the ministers, royal prerogative benefits the democracy. Professor Dicey is not obliged to rest his case upon a mere theory. In 1872 there was a growing sense in the nation that the practice of purchasing offices in the army, a practice which had furnished to the titled and wealthy classes a convenient way of providing for their sons, ought to be abolished by law. Mr. Gladstone's government accordingly brought in a bill to abolish the abuse. The House of Lords refused to pass the bill. Mr. Gladstone and his cabinet in this emergency concluded to remove the abuse by a royal order. The other case is the one which I have already described. It is by a threat of the exercise of the royal prerogative in the

[1] Page 392.

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making of new peers that the resistance of the House of Lords to the great democratic reforms of the century has been overcome. This theory and practice gives to English democracy a double-barrelled weapon. Under ordinary circumstances it brings down its game through Parliament; but if it fails with this, it can resort to the royal order. Thus in English law the most effective manifestation of unchecked democracy bears the name, royal prerogative.

It is natural that an intelligent democrat should think that this situation is too good to be true; and that there must be some hocus-pocus about it. Or, if it is true, how did the ruling classes in England get caught in such a trap? It is certain that this view of the constitution is of recent origin. When Mr. Bagehot wrote his marvellous book he seemed to have been gifted with a sort of clairvoyant power which enabled him to see all that was true about the constitution and some things which never existed. Yet with all his keenness of perception he does not seem to have discovered the extreme democratic possibilities of the royal prerogative. Mr. Bagehot peopled England with a peculiar sort of laboring men, whose minds were overcome with the majesty of the queen. He saw in the crown enough magic to paralyze the minds of the ignorant masses and thus prevent them from ruining the government by an attempt to govern. "The masses of Englishmen," said he, "are not fit for an elective government."[1] I do not believe that the sort of laboring men which Mr. Bagehot describes ever existed in England in controlling numbers. I was in England during the last half of Queen Victoria's jubilee year, and was unable to find even one well-preserved specimen. But I did find among the educated classes a few excellent examples of that peculiar paralysis of intellect before the majesty of the crown. I can well believe that the power of the crown to impose has been great; yet those who have been imposed upon have been chiefly of the ruling educated class. This has given rise to two erroneous beliefs: (1) That the masses are affected by the crown in a way in which they are not affected; (2) that the real powers of the

[1] English Constitution, p. 122.

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crown are greater than they are. And these beliefs have had much to do with the mental ease of the ruling classes in view of democratic reforms.

It should be said in passing that logic — pure logic — has had a good deal to do with the attainment of a democratic royal prerogative. Our modern method of studying politics has tended somewhat to discredit the value of logic. Nevertheless it is a respectable political force, and the relation of the crown to the present and prospective democracy of England is not likely to be fully understood without a constant realization of the logic of the position. We may not all agree upon the definition of the word constitution, but we do all agree that one of the chief objects of a constitution is to enable the different governmental agencies to work together harmoniously. All constitutions, written and unwritten, depend for their subsistence in large part upon the state of mind of the people. But a constitution like the English, which is largely made up of mere understandings, is peculiarly subject to the direct action of the mind. In the not distant past the English conceived of their nation as made up of distinct classes, and each of these classes was thought of as having distinct and inalienable rights, powers and duties. Logically, then, it was the end of the constitution to secure to each class its rights, and to effect the harmonious co-operation of all the classes in matters of state. But the present habit of Englishmen is to think of their nation as composed of a consolidated people. Every member is thought of simply as a human being, from the queen on the throne to the meanest member of the "submerged tenth." It is now the end of the constitution to find an agency for the expression of the will of this undivided nation, and to harmonize every government organ with its action. The agency selected is the House of Commons. Harmony is secured by subordinating every other governmental organ to this. This principle carried to its ultimate conclusion would remove the last vestige of undemocratic power from the English constitution.

There is no inconsistency in the contention that partial paralysis of intellect in view of the majesty of the crown

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should exist at the same time — and in the same mind, for that matter — with the power of logic, and that both should tend to the same end. Logic may promote error as well as truth. The men still live in England who were educated into the belief that it was the very essence of the constitution to secure to the various classes their separate rights and powers. When a man gets a conviction of that sort, which is in exact accord with his strongest desires, fixed in his head, he is not going to give it up for a trifle. There is reason to believe that the same individual may continue in such a course of reasoning long after he has been forced to assent to another course of reasoning which squarely contradicts it. I believe it is Pope who said, when asked which of two arguments was correct, one for and the other against the Catholic religion, that he was obliged to accept them both; that he was a Catholic or a Protestant according as he read last the Catholic or the Protestant argument. There is reason to believe that many Englishmen are to-day democrats or aristocrats according as they are thrown into an old line of reasoning or into a new one. They are not so much convinced as they are outwitted.

I have not intended to convey the impression that the actual English constitution of to-day is entirely democratic in all its parts. I have nowhere said that the monarch was altogether without power and influence. I did express an opinion that many Englishmen are led through a superstitious reverence to believe that this power and influence are greater than they are in fact. Yet all authorities agree that the personal character of the monarch is a real political factor. There is no question connected with English politics respecting which it is so difficult to get reliable information as the political value of the present power and influence of the Queen. Just how far is the parliamentary programme framed by the cabinet without reference to the views of the Queen? Just how much does the Queen influence the cabinet in the matter of appointments and in the conduct of foreign affairs and in the exercise of other royal prerogatives? To these questions it is not possible to find a satisfactory answer. According to the forms of law it is the Queen alone who does all these things. In respect to some of

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them it is pretty well settled that she has practically nothing to do. Yet she does do something; how much it is not easy to find out.

Mr. Bagehot has left nothing to be desired in respect to a part of this branch of the English constitution. He has analyzed the executive into its two component factors. He has convinced us that he saw clearly the cabinet on the one hand and the monarch on the other, and could, if he would, tell us all about the relations of the two. He gives a good many details of the method of contact between monarch and ministers in former generations when the constitution was something very different from what it is to-day. He says that the elder Pitt used to kneel in the presence of the King, and he makes the dogmatic statement that a man cannot argue well on his knees. He is exceedingly detailed and explicit as to the way in which an ideal king and his ministers would commune with each other under the English constitution as it is to-day. Hear what he says:

> The sovereign has under a constitutional monarchy such as ours three rights — the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others. He would find that his having no others would enable him to use these with singular effect. He would say to his minister: "The responsibility of these measures is upon you. Whatever you think best shall have my full and effective support. *But* you will observe that for this reason and that reason what you do not propose to do is better. I do not oppose, it is my duty not to oppose; but observe that I *warn*." Suppose the king to be right, and to have what kings often have, the gift of effective expression, he could not help moving his minister. He might not always turn his course, but he would always trouble his mind.[1]

It would be wide of the mark to accept this as Bagehot's teaching of the style of conversation which actually takes place between the ministers and the Queen. He is giving an ideal case such as has not been and, if we accept the general teachings of his book, is not likely to be. As to the actual share of the Queen in government he says:

[1] The English Constitution, p. 143.

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A secret prerogative is an anomaly — perhaps the greatest of anomalies. That secrecy is, however, essential to the utility of English royalty as it is now. Above all things our royalty is to be reverenced, and if you begin to poke about it you cannot reverence it. When there is a select committee on the Queen the charm of royalty will be gone. Its mystery is its life. We must not let in daylight upon magic.[1]

Thus, after convincing us that he above all others was capable of shedding light upon this important part of the government, he flatly refuses to let his light shine. If he really feared lest the reverence for the Queen should be diminished, then by all means he ought never to have allowed his book to see the light. The book has probably done more to destroy a reverence for royalty than would any quantity of poking about it by select committees on the Queen.

A few facts and incidents may serve to illustrate the actual relation of the Queen to her ministers. Only a few months ago our daily papers announced that the Queen had refused to summon Parliament unless the cabinet would consent to make an additional grant to a member of her family, and that the cabinet had refused to approve the grant. It is likely that there is not a particle of truth in this report, for the relation between crown and cabinet is a confidential one and facts are not likely to be given to the public. Yet for purposes of illustration I may assume that the report is true. We know then that the Queen and the cabinet, or the Queen and the prime minister who consults with her on cabinet matters, have been trying to arrange a parliamentary programme for next session, and that they have disagreed about one of the items. The report assumes that Parliament cannot be summoned unless the Queen, in person, takes some share in the matter. Is it true then that the Queen has in her hands power to exact legislative measures from her ministers upon pain of depriving the nation of its Parliament?

This cannot be, for many reasons. The passage which I have quoted from Mr. Bagehot leaves no doubt as to what a good constitutional queen would do in such case. She would say: "For

[1] The English Constitution, p. 127.

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such and such reasons my way is better than yours. Yet I do not oppose; it is my duty not to oppose. Whatever you think best shall have my full and effective support."

We will now treat the case upon the supposition that the Queen is obstinate. Again Mr. Bagehot is our best guide. In his essay on Lord Brougham[1] he gives an incident upon the authority of Mr. Roebuck which covers the case in point. It was in the time of William IV. The King obstinately refused to dissolve Parliament when his cabinet advised him to do so. The cabinet without the knowledge of the King gave orders to the great officers of state notifying them that the King required their attendance at a certain hour upon the ceremony of the dissolution of Parliament. The ministers likewise gave the customary orders to the keepers of the crown and the robes to have them in readiness at the proper time and place. As a climax of audacity, they ordered the troops, the King's body-guards, to be in readiness. According to law, it was understood that the troops on such an occasion could only be moved by the personal order of the King. Having made all these preparations, Lord Grey, the prime minister, and Lord Brougham, who was Lord Chancellor, went to the King to get him in readiness for the ceremony. The King objected that the preparations could not be made in the time specified, and they informed him, one by one, of the orders which they had given in the King's name. When the matter of the troops was reached, the King said: "The troops have had no orders and cannot be ready in time." "Pardon me, sir," said the Lord Chancellor, "we know how bold the step is, that, presuming on your great goodness and your anxious desire for the safety of your kingdom and the happiness of your people, we have presumed to take. I have given orders, and the troops are ready." The King started in serious anger, flamed red in the face and burst forth with: "What, my lords, have you dared to act thus? Such a thing was never heard of. You, my Lord Chancellor, ought to know that such an act is high treason, my lord." Brougham replied that he did know that it was high treason. Yet he humbly besought

[1] The English Constitution, p. 402.

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the King to pardon him, and for the sake of the safety of the kingdom, to accept their advice and attend to the matter of the dissolution of Parliament. The King yielded. The moral of this story is obvious enough. The Queen must give effective support to whatever the cabinet advises. When a monarch is insane or is unable to attend to the duties of the office, the ministers appoint a regent in his place. If it should be found impossible to get along with a particular monarch, the constitutional difficulty might be overcome by a regency. A democratic cabinet may be trusted to name a regent who would do as he was advised to do. It was called treason, sixty years ago, for the ministers to give orders to the King's body-guard without the King's knowledge and in opposition to his known wishes. Lord Hartington in a recent speech called it treason to obstruct the measures of the cabinet in the House of Commons. If democracy is king, if the House of Commons is the chosen agency of the democracy, if legislative and executive power are committed to a cabinet whose life is determined by forces centering in the House of Commons; then it would be treason for the Queen to obstruct the measures of the cabinet. Whatever may have been true in the past, the Queen is now a subject. She must obey the constitution.

As a subject the Queen has some peculiar privileges and some limitations. It is the peculiar privilege of the Queen to be informed of a part of the plans of the cabinet before these plans are made known to the public; and being informed, she may warn or she may encourage. The only peculiarity about this privilege is in respect to time. The Queen is informed before other subjects. Every day a portion of time is given in the House of Commons to the questioning of the ministers as to their intentions. By this and other agencies the rest of the nation asserts its right to be informed of the plans of the cabinet. Sometimes the ministers say, in answer to a question, that the exigencies of the public business are such that they deem it unwise to answer at the time the question is asked. The Queen, it is maintained, has a right to be informed even though the business may be delicate. But on the matter of

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warning or encouraging, the other subjects are not a whit behind the Queen in their privileges and duties. There is a front opposition bench in the House of Commons, occupied by the shrewdest statesmen in the United Kingdom, whose chief occupation it is to warn and discourage the Queen's ministers. Many times it has happened that a cabinet that has not yielded to the warnings of the Queen, that has successfully resisted the opposition in the House of Commons, has yet been induced to yield to the wishes of voters expressed in a mass meeting in Hyde Park. All classes in and out of Parliament exercise the right to warn the ministers.

The constitutional right of the Queen to be informed of the intentions of the ministers is made to rest largely upon the case of Lord Palmerston, who, in 1852, persisted in making important communications to the French government without the knowledge of the Queen and of the other members of the cabinet, and for this offence was publicly reprimanded and removed from the office of secretary of state. It should be observed that in this case Lord Palmerston was acting contrary to the requirements of the prime minister, as well as in disregard of the privileges of the Queen. If a case should occur in which it was thought best by an entire cabinet to do a thing without the knowledge of the Queen, and if a contest should be made over this point and the cabinet should be sustained by the voice of the nation as expressed through the House of Commons, then a new clause, or a new understanding, would be added to the constitution; the right of the Queen to be informed would then be destroyed. In the absence of any contest of this sort, it is assumed that the Queen has a right to know anything she wants to know about the plans of the cabinet. Yet, in the very nature of the case, it must be that she is really informed of only a small part of the business of the ministers. It is probably true that they make a judicious selection of the particular things which the Queen shall know. The matters laid before the Queen for her consideration are undoubtedly the more important matters of state. It is understood that the Queen is to be especially consulted on matters of foreign policy.

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Another peculiar privilege of the Queen is exemption from hostile criticism. As the constitution fixes the responsibility upon the ministers, it is understood that the ministers alone are to be criticised for official acts. This is now a part of the constitution; yet it rests upon a shadowy foundation. Since the democracy of England has begun to attain self-consciousness, its special antipathy has been the House of Lords. While this antipathy lasts it is not strange that the crown should be measurably exempt from hostile criticism; especially when we remember how effective have been the royal orders against the power of the Lords. But when this special antipathy shall have been removed, the constitution is sure to suffer a change in regard to the exemption of the crown from criticism, and one of two things will happen. Either the monarch will cease to exert a perceptible influence over the policy of the cabinet, or the personal acts of the monarch will be subject to criticism as are those of any other public official. The same principle which has removed from the monarch all effective power tends to remove from the office every vestige of secret influence. In a successful democracy, a secret society can never have a fair chance as a political factor. It is sure to be suspected of worse intentions than it has. The secret influence of the monarch will not escape the operation of this principle.

No one who has had his eyes open to recent events in English politics will accuse me of prophesying without a sign. Has not the Queen been blamed because she was suspected of being more loyal to Lord Beaconsfield's and Lord Salisbury's governments than to Mr. Gladstone's? Have the objections to grants to the royal household grown more dove-like in tone, or do they constantly become more lion-like? Does it require a great effort of the imagination to see that, if the conscious dependence of the democracy upon the crown as a weapon against the House of Lords were removed, a condition would soon be reached where the fact that the monarch was suspected of favoring a certain policy or a certain party would be a positive force in the opposite direction? In that case a prime minister would have to rid himself of all suspicion of royal influence.

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Incident to the few privileges peculiar to the monarch there are a number of peculiar limitations. If the monarch is not to be publicly criticised, then it is a violation of the constitution for the monarch publicly to criticise any other official. When some expressions found their way into the public press which had the appearance of a reflection by the Queen upon the Egyptian policy of Mr. Gladstone's government, there was a pretty general feeling that a blunder had been committed. The constitution does not permit the Queen to criticise her ministers publicly. Again, the Queen is deprived of some of the liberties of an ordinary subject in the matter of private correspondence. She cannot write to her children as freely as do other parents. If the constitution requires the cabinet to inform the Queen, in advance, of their intended policy, it likewise requires her to keep the secrets of the cabinet. Several times complaint has been made that the Queen's private correspondence has served to complicate the diplomatic policy of the cabinet.

From what has been said it is evident that the forces are already well advanced which will remove from the office of the crown everything that is undemocratic in its nature. What then will remain? There may still remain the forms of law which will make it inconvenient or impossible to commit the constitution to writing. There may still remain the requirement that the monarch shall go through the form of appointing the ministers. The cabinet may still be required to present in a formal manner to the monarch important parts of their programme before submitting them to Parliament. Not one of these acts has in itself anything about it which is necessarily undemocratic, and each of them may have an important bearing on the maintenance and the success of the extreme English type of unchecked democracy. The cabinet might be required to get its programme in order and, before presenting it to Parliament, to read it over in a clear, distinct voice in front of the statue of the Duke of Wellington. This might be called queer, but no one has any right to say that it would be undemocratic. The presentation of the programme to the monarch could never appear

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so queer. Good reasons may be given why an instructed democracy may wish to prolong this ceremony.

It is of the very essence of this extreme type of democracy that the cabinet continue to possess supreme legislative and executive power. It is difficult to see how this could be if the constitution should be reduced to writing. By means of the unwritten constitution the forms of law which attribute all power to the monarch are reduced to a baseless shadow when applied to the king, yet the constitution has transmuted these forms into substance when applied to the cabinet. Will some one explain how such a pass could have been reached if the constitution had been written and formal? If an election should occur in England to-morrow, everybody would understand that the democracy of England would decide whether they were to have Lord Salisbury and a group of men whom he would select, to exercise supreme power; or Mr. Gladstone and a group of men whom he would select. The Queen would appoint whomever the democracy should indicate as their choice. If the Queen did not go through this form of appointment, then some other legal form would have to be invented and adopted. I should like to have some one explain how a substitute for the Queen's act could be inaugurated, which would not at the same time tend to divide and weaken the power of the cabinet.

What then is the democracy of England likely to do with the office of the crown? I admit that I here enter a field of pure prophecy where the signs are not numerous. He who looks to the ignorance of the laboring man in England to prolong the existence of the crown leans upon a broken reed. Yet it seems to me not at all unlikely that an educated and instructed democracy may seek to perpetuate the crown in order that it may prolong the existence of the most effective democratic agency the world has yet seen on a large scale.

I shall mention only one sign. For several years Lord Salisbury has been trying to throw a bait to the English democracy by dropping the suggestion, by the way, that a reformed House of Lords would have greater power than the present House, and thus the House of Commons would be weakened. Some of the

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extreme democrats are manifesting a tendency to act upon Lord Salisbury's suggestion.[1] They do not want a power which shall compete with the House of Commons. True, extreme democrats would abolish the House of Lords; yet, as between letting the House of Lords remain as it is and depending upon forces already in their hands to eliminate from it all that is obstructive, and reforming it and thus creating a more powerful second chamber, a preference is expressed for the House as it is. If there is some tendency to an alliance between conservative and democrat to prolong the existence of the House of Lords, it is conceivable that such an alliance might be effective in the case of the crown.

I have assumed throughout this article, as is assumed in current political literature, that the English cabinet, barring the power and influence of the House of Lords and the crown, is entirely democratic. It is beyond my purpose in this place to show how thoroughly democratic it is, by explaining in detail the relation of the cabinet to the voters and to the House of Commons. It is still further from my purpose to show how effective is the cabinet system of government when compared with our own system of divided powers.

JESSE MACY.

[1] *Reynolds' Newspaper*, November 29, 1891.

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IRISH LAND LEGISLATION SINCE 1845. II.

III. *Legislation recognizing the Possessory Right of the Tenant (concluded).*

THE occasion for a reopening of the whole question as to the relations of landlord and tenant was furnished by nature. From 1870 to 1877 the general condition of Irish agriculture had been to all outward appearances highly prosperous. In 1878, however, there was a partial failure of the potato crop, and this was followed the next year by an almost total failure. The suffering that immediately manifested itself in many parts of Ireland showed quite conclusively how superficial was the prosperity that had prevailed. Most conspicuous among the phenomena of the new situation were the strained relations between landlords and tenantry all over the island, and the notable increase in evictions and in agrarian crime. By the end of 1879 Ireland was once more the most conspicuous fact in British politics. In the fall of that year the Land League was organized, and the systematic campaign against landlordism and rent was duly inaugurated. It is quite beyond the scope of this article to describe the agitation that filled the years from 1879 to 1886. Suffice it to note that out of the turmoil of this time arises the great land law of 1881 and its associated measures, and that amid the lurid incidents of these years the transition period of the Irish land question comes rapidly to a close.

In the multitude of opinions as to the real causes and the proper remedies of the discontent, all the views which I have sought to make familiar were again ventilated, and along with these many of a modified character which time and more careful historical study had brought forth. For those of the Conservative, the Liberal and the Irish Nationalist parties respectively, the reports of the Richmond and Bessborough Commissions and the programme of the Land League may be taken as in a

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general way representative. The Richmond Commission was appointed by the Beaconsfield ministry in 1879 to make a general study of the agricultural depression which affected Great Britain as well as Ireland. Only that part of its work touching the latter country attracted great attention.[1] The evidence it collected was exceedingly full and valuable, but its report was very conservative in tone. As to the causes of the depression, at least all due prominence was given to those which could not reflect on the landlords. The inclemency of the seasons, causing failure of the potato crop, and the rigor of foreign (American) competition in agricultural products were mentioned, but more importance was ascribed to the inordinate inflation of credit due to the assignment of a value to the tenant's interest in his holding by the act of 1870. The excessive competition for land was held responsible for a number of serious evils, namely, unreasonable payments for tenant right, arbitrary increase of rents, overcrowding of the population in certain districts and minute subdivision of farms. The remedies suggested for the deplorable conditions carry us back to the earliest days of the land question: emigration and migration;[2] public works for the development of the country; the encouragement of sound education in agricultural methods; and finally, but in a very mild form, modification of the conditions of tenure.

> The desire for legislative interference to protect him [the tenant] from arbitrary increase of rent does not seem unnatural; and we are inclined to think that by the majority of landowners legislation properly framed to accomplish this end would not be objected to.

Such was Conservative concession to the agitators who were then filling the welkin with wild demands for fair rents or no rents at all. And even this guarded expression of an inclination to an opinion was counterbalanced by Professor Bonamy Price, who, in the name of political economy, appended to the commission's report a most vigorous attack on the three F's.

At the opposite extreme from the views of the Richmond

[1] For the report, see Parliamentary Papers, 1881, vol. xv.

[2] That is, the transfer of population from the overcrowded to the less densely peopled parts of the island.

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Commission lay the ideas advocated by the Land League.[1] The immediate causes of discontent in Ireland were, in the view of this organization, not so widely different from those stated by the Richmond Commission, but the ultimate and fundamental responsibility for the trouble was to be laid at the door of landlordism as an institution. So long as such a system existed in Ireland, situations like the present would inevitably recur from time to time. The competition of the free lands of America and other favored countries would always be fatal to the success of agriculture under the "rent-tied and paralyzing conditions" in Ireland. Irish landlordism had neglected its duties, but had stood unflinchingly upon its rights. The excessive rents which were everywhere the rule, and the evictions which were mercilessly enforced for non-payment, were the evidence of this. As for remedies, there was but one. The act of 1870 had failed. Compensation for disturbance had not protected the tenant from injustice — had not secured him in the quiet and peaceable possession of his home. Nor would the three F's be more effective. Fair rents meant government valuation; and government valuation meant more or less complicated and expensive litigation.[2] This would be no boon to the small holder, whose sufferings were the worst. Rents must cease altogether. The occupier must become the proprietor of his holding, and the landlord and tenant system — an exotic in Ireland, and hence of distorted growth — must be swept away. But this was not to involve the financial ruin of the landlords. Whatever was taken from them was to be paid for.[3] The method of effecting this great revolution in tenure should be by government advances of purchase money wherever landlords and tenants could agree as to terms; elsewhere, by direct expropriation by the government and then sale or letting to the old tenantry.

[1] The constitution and other documents illustrating the character and objects of the Land League are given in full in Russell's Speech before the Parnell Commission (Macmillan, 1889), chapter ix.

[2] For an able criticism of past and proposed legislation from the Land League standpoint, see the "Programme of Parliamentary Land Reform," given in full in Russell, p. 201.

[3] It may be remarked that the terms suggested were not such as to engender a vast amount of enthusiasm among the landowners.

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Between the two extreme views as to the causes of the situation and its remedies lay that embodied in the report of the Bessborough Commission. This body was appointed by the Gladstone ministry in 1880 for the special purpose of investigating the operation of the act of 1870. Its members were all landlords, but of a liberal kind, and its report stands out as one of the most valuable contributions ever made to the philosophic study of the land question.[1] As to the act of 1870, the commission was obliged to believe that it had failed in its purpose. The statistics of recent evictions revealed that security of tenure had not been attained. But it was this security for the actual cultivator of the land that was absolutely indispensable to Ireland's welfare, and the claim to such security rested upon the fact that the tenant had always had morally, and until late years legally, a positive proprietary interest in his holding. That is, the tenancy from year to year, which had for generations been the prevailing tenure in Ireland, had been customarily regarded by the occupier as a permanent tenure so long as the rent was paid.[2] Openly in Ulster and secretly throughout the rest of the country, the sale of the tenant's interest had long been a common practice. History revealed clearly the fact that from the days of clan ownership, before the English conquest, through the troublous times of the plantations and through all later changes,

> the Irish farmer remained faithful to the soil of his holding and persistent in the vindication of his right to hold it. In the result there has in general survived to him through all vicissitudes, in spite of the seeming or real veto of the law, in apparent defiance of political economy, a living tradition of possessory right such as belonged in the more primitive ages of society to the status of the man who tilled the soil.

This feeling among the tenantry had been encouraged by the general attitude of the landlords. Evictions had not been a common practice, even for non-payment of rent; and rents had

[1] For the report, see Parliamentary Papers, 1881, vol. xviii.

[2] The widely noticed unpopularity of leases in Ireland was due to this feeling. The tenant regarded a lease as a device for setting a limit to his occupation, which otherwise would be without limit.

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never been kept up to what would have been considered in England a full commercial rate. But during the present century English law had taken a steady course away from the ideas of status and had sought to draw Ireland with it. Ejectment had been made a very simple instead of an extremely difficult procedure.[1] Deasy's Act had definitely declared the substitution of contract for status as the principle of the land law. But this enactment, the commission thought,

> may be said to have given utterance to the wishes of the legislature that the traditional rights of the tenants should cease to exist rather than to have seriously affected the conditions of their existence.

In view of all these circumstances, the conclusion was that the tendency to depart from the recognition of the tenant's interest must be checked. The spoliation of the cultivator by law must cease, and on the other hand, all efforts must be made to guard the interest which was morally and traditionally his.

As to the means for the accomplishment of these ends, two presented themselves as practicable: first, the shaping of legislation to insure the existence of the tenant's proprietary interest by the side of the landlord's — the full and positive development of the principle adopted in a partial and negative way in 1870; second, the abandonment of all efforts to maintain the two interests side by side, and the application of every energy to the creation of a peasant proprietary. To the majority of the commission the former seemed the more feasible plan, and the recommendations in detail presented in general the scheme of the three F's which the Irish leaders had for ten years or more been advocating. But the majority of the commission fully recognized the wisdom of financial encouragement to tenant purchasers, and one of the members, the O'Conor Don, sketched in a separate report a complete project for the transfer of ownership to the tenantry through government instrumentality.

Out of the many propositions before the public for deal-

[1] For a summary of the development of the law of ejectment, see Report of the Commission, Appendix F. It may be noted here that the exceeding inhumanity of some incidents of the law of distress had had more or less to do with the development of ejectment as a remedy in case of non-payment of rent.

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ing anew with the land question, Mr. Gladstone's ministry chose that embodied in the Bessborough Commission's report for its principal guide in framing the measure which became the Land Law (Ireland) 1881.[1] While almost all the remedies of all the parties were given recognition — emigration, peasant proprietorship and the rest — the question of tenure formed the central point in the elaborate structure, and the solution reached was an approximation to the three F's.[2] It was assumed that the act of 1870 was a step in the right direction. The tenant interest which had in that act been recognized positively by legalizing the Ulster custom and negatively by the compensation for disturbance, was impressed now with the completest statutory character as property by the enactment of the first "F," namely, Free sale. We have seen[3] with what earnestness Mr. Gladstone had labored in 1870 to disclaim the creation of a proprietary interest for the tenant. In 1881 he still insisted that compensation for disturbance had been designed as a penalty on the landlord, and not at all as a right of the tenant, but he confessed with sadness that whether intended or not, the effect of this legislation had been to make tenant right "something sensible and considerable."[4] This result of positive legislation, coupled with the traditional feeling of possessory right among the people of Ireland and with the fact that by common law the sale of an estate in land, however insignificant, was permissible, was made the justification of the first part of the act. The essence of this part is the enactment that a tenant[5] shall be permitted to sell his tenancy for the best price he can get. What had been sedulously avoided in 1870 was thus adopted, and a share in the value of every holding was secured to the occupier. What had developed by custom in Ulster was created by statute elsewhere. To the cry

[1] 44 and 45 Vict. c. 49.

[2] "The three F's I have always seen printed have been three capital F's; but the three F's in this bill, if they are in it at all, are three little f's." Gladstone, Hansard, vol. cclxiii, p. 1419.

[3] See this QUARTERLY for March, 1892, p. 77.

[4] Hansard, vol. cclx, p. 902.

[5] Agricultural and pastoral holdings only are referred to.

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of confiscation raised by the landlord interest, it was answered that the value of the landlord's property was measured by his rent, and that by this clause rent was not touched. To the argument that the competitive price paid for tenant right must inevitably reduce rents, it was retorted, with an aptness which eleven years' study had made possible: not more than competitive rents and a century and a half of legislation facilitating ejectment have reduced the value of tenant right.[1] The recognition of the occupier's interest was thus given the character of a revival — a restoration of rights which the era of free contract had unjustly taken away.

The economic problem presented by the definite establishment of a dual interest in every holding was quite analogous to that involved in the relations of wages and profits. The produce of the farm was the fund from which must be derived the rent and the interest on the tenant right. With that produce a fixed quantity, it was inevitable that increase in either of the divisors must mean decrease in the other. This was the ground on which the landlords claimed that the institution of tenant right where only rent had existed before was confiscation.[2] They earnestly demanded a definition of the tenant's interest which would show that rent would not be affected. Such a definition was attempted by some speakers, who pointed out that, according to the Bessborough Commission, full commercial rent was not usually exacted in Ireland, and that the tenant was merely assured the difference between this possible rack rent and the actual rent. Others again suggested the solution like that which recent political economy has tended to give to the wages question,— that the encouragement and security given to the farmer by the recognition of his interest would result in a greater gross product from the farm, so that both landlord's and tenant's interest might increase in value together.[3] But no close definition of tenant right was undertaken in the act itself,

[1] *Cf.* Gladstone, Hansard, vol. cclxi, p. 587.

[2] A demand for compensation to the landlords was a conspicuous feature of Conservative policy toward the bill.

[3] Hansard, vol. cclx, p. 1408.

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and not only theory but the experience of the last eleven years supported the claim that the two interests in the same property were antagonistic. Since the legislation of 1870 had brought the subject to general notice and had intensified the antithesis of rent and tenant right, the struggle of the landlords against the latter had become much more vigorous than before. The evidence of both the great commissions contains abundant illustrations of this. In Ulster the work had been carried on by "office rules" imposing a maximum limit on the price to be paid for tenant right or requiring an increase of rent at each transfer. Elsewhere rents had been raised to cover the risk of compensation for disturbance, and in many instances the payment of the compensation had been willingly undertaken by the incoming tenant.[1] The success which attended these efforts of the landlords set in strong light a fact of the utmost significance, namely, that the fierceness of the competition for land holdings in Ireland made the outcome of the conflict between the two interests demanding a share of the produce perfectly certain from the beginning. Rent was economically the strongest and tenant right must go to the wall. This was the basis of the government's further step now in taking up the second "F,"— Fair rents. Having given a clear legal recognition to the tenant's interest, the act of 1881 proceeds to close up the avenue through which the landlord might by virtue of economic forces successfully assail it. The situation in which tenant right was restricted and rent determined by free competition was reversed, and henceforth it was rent that was to be restricted, while tenant right was to benefit by the free competition.

The essential provision in reference to this matter is that of section 8, according to which any tenant of a present tenancy who is dissatisfied with the existing or proposed rent may apply to the court, where, after consideration of all the circumstances of the case, a fair rent is to be fixed. No definition or description of fair rent is undertaken in the bill; all is left to the dis-

[1] This practice, oddly enough, amounts practically to the sale of the holding. The tenant, not the landlord, pays the cost of eviction.

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cretion of the court.[1] The animus of the enactment is sufficiently obvious, however, and the chief duty of the court is understood to be the protection of the tenant's interest — the restriction of rents to such figures as shall leave a market value to tenant right. Fair rent, said the attorney-general for Ireland, means "competition rent minus the yearly value of the tenant's interest in the holding."[2] The court was to protect the economically weaker interest against the destructive forces of free competition. The landlord still retained the right to demand higher rent, and, on the other hand, he was authorized to obtain from the court, at the time of fixing the rent, a valuation at which he might pre-empt the tenant right. In these powers was supposed to be adequate protection for his interest. For future tenancies[3] the provision was that, upon a demand for higher rent, the tenant might sell the holding, subject to the increased rent, and might then obtain from the landlord through the court the amount by which the increased rent should be judged to have depreciated the selling price of his interest.

The adoption of the principle of valued rents made absolutely necessary some degree of fixity of tenure. The basis of Mr. Gladstone's arrangement on this point is a secure term of fifteen years renewable practically forever. During this term the rent cannot be raised nor will application for reduction be entertained by the court, and the tenant can only be ousted for breach of one of six "statutory conditions," of which the most important are (1) due payment of the rent, (2) abstention from persistent waste, (3) abstention from subdividing or subletting the holding. A tenancy becomes subject to this term and these

[1] The first draft of the bill contained a clause directing the court to guide itself by the compensation for disturbance which would apply to any holding in question. But the construction of the clause was shown by the Tories to require in some cases the fixing of the rent at a negative quantity, and the government was forced to abandon the instruction. *Cf.* Gibson, Hansard, vol. cclx, p. 1085 *et seq.*

[2] Hansard, vol. cclx, p. 1399. It is evident from this definition that the tenant who succeeds to a holding by purchase may be subject to a virtual rack rent, the two elements of which are the fair rent that goes to the landlord and the interest on the purchase money, which in too many cases goes to the "gombeen man," or usurer.

[3] Those created after the passage of the act, *e.g.* if the landlord lets a portion of his demesne or a holding of which he has bought up the tenant right.

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conditions (1) when the tenant accepts the demand of the landlord for an increased rent, (2) when a judicial rent has been fixed by the court and (3) when landlord and tenant file in court an agreement as to a fair rent. The law also provides for the creation of a "fixed tenancy" in the fullest sense of the term by the voluntary agreement of landlord and tenant.[1] At the same time that these provisions opened the way to an unheard-of transformation in the old tenancies at will, the act of 1870 was still left in force for the benefit of occupiers who from circumstances or inclination kept away from the complexities of the new law. The scale of compensation for disturbance was modified to avoid certain defects that had been noted in experience, and was made rather more severe. The provisions touching compensation for improvements, also, were subjected to amendments that increased their usefulness to the tenants. And under certain conditions suggested by the new measure, the encouragement to the creation of leaseholds for over thirty-one years was continued. Thus *security* of tenure was moulded into one great system with that degree of *fixity* which the conservative spirit of British legislation was now prepared to accept.

The other feature of the act of 1881 which attracted especial attention was the part dealing with public advances to promote the purchase of holdings. In regard to the encouragement of a peasant proprietary, a notable change of attitude in the last decade became apparent. Tory and Parnellite extremes now came together in the greatest harmony in support of the principle, and indeed opposition to it was practically unknown. Differences of opinion only emerged when the method and extent of the government's assistance in realizing the principle came into discussion. The decisive influence in determining the limits of government aid was the "financial conscience" of Mr. Gladstone and Sir Stafford Northcote, who, as leaders respectively of the two parties, agreed in dreading the responsibility that would be incurred by too generous draughts on the treasury for the benefit of either interest in Irish affairs.[2] Without treating in detail at this point the provisions finally

[1] Section 11.

[2] *Cf.* Hansard, vol. cclxiii, p. 302, 404 *et seq.*

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agreed upon, it is sufficient to note that a very general opinion prevailed already, that in government assistance to tenant purchase lay the germ of the final solution of the vexatious question. Lord Hartington had gone so far as to assert in a public address that the earlier parts of the bill were only a *modus vivendi* to effect the transition to peasant proprietorship. And all Mr. Gladstone's unrivalled skill in explaining away this declaration of his colleague, and all his genius in convincing himself that co-proprietorship was a real and final settlement of the question, failed to effect a radical modification in the general belief.

The career of the act of 1881 was not altogether prosperous. In the first place the law was regarded with the bitterest hostility by the landlord class. But far more threatening to its prospects was the attitude of antagonism assumed by the Land League. It was the unrelenting agitation of this organization and its successor, the National League, against landlordism and rent that rendered supplementary legislation indispensable to the working of the great act. From Mr. Gladstone's government was extorted the Arrears Act of 1882,[1] by which, for tenancies of under £30 valuation, arrears of rent which had accrued before 1881 were swept away so far as the tenants were concerned, the treasury paying to the landlord one-half the amount due. As a result of this concession the hostility of the league to the act of 1881 was somewhat mitigated,[2] but after the accession of the Conservatives in 1886 on the home-rule question the anti-rent agitation was renewed. The special basis now was the great fall in agricultural prices beginning in 1885, and the result was the act of 1887.[3]

By this law a number of amendments were made to the

[1] 45 and 46 Vict. c. 47.

[2] This was said to have been in accordance with an understanding between Mr. Parnell and the government, known as the "Kilmainham Treaty."

[3] 50 and 51 Vict. c. 33. The preliminary step to this act was the work of the Cowper Commission, which, after an elaborate investigation, reported that the fall in prices constituted a serious feature of the existing situation and that the ability of the tenants in very many cases to pay even the judicial rents was beyond question. The commission recommended some sweeping changes in the act of 1881, notably a lessening of the statutory term of fixed rent from fifteen to five years. For the report see Parliamentary Papers, 1887, vol. xxvi.

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act of 1881, with the general effect of increasing its benefits to tenants. Leaseholders, who by the original act were entitled to the judicial revision of rent and other rights of present tenants only at the expiration of their leases, were now enabled to participate in those privileges immediately. Modifications in the law of ejectment were enacted for the purpose of checking, if possible, the number of evictions, which, in the present state of agitation, were in every instance the occasion of scandalous and often of murderous scenes. But the most significant provisions were those dealing with judicial rents. Up to August 22, 1886, judicial rents had been fixed for 176,800 of the 350,000 holdings subject to the act of 1881, and the average reduction had been 18.2 per cent.[1] But now the cry was raised — and with admitted justice — that these judicial rents were too high. And it appeared that the commissioners administering the Land Act, in view of the fall in prices in the last two years, had adopted a much more liberal scale in making reductions than had been employed in the earlier years.[2] This fact naturally aggravated the discontent of those tenants who had had the misfortune to make early application. It was accordingly provided in the act of 1887 that the court should have power for three years to relax the judicial rents where the fall in agricultural prices seemed to the court to justify such action.[3] Nothing could indicate more clearly than this that the permanence and finality of the settlement in 1881 were delusive. Instead of the regular periodical revision of rents which the bill contemplated, there was opened up an endless prospect of irregular interventions of the legislature on every fluctuation in economic conditions.[4]

The Conservative government had but little heart for these final efforts to float the system of 1881 along against the tide

[1] From £3,227,021 to £2,638,549. See report of the Cowper Commission, pp. 6, 7.

[2] Cowper Commission, p. 8.

[3] The court was also authorized to stay eviction proceedings for non-payment of rent, judicial or otherwise, when satisfied that immediate payment was impossible, but not through any conduct, act or default of the tenant. See sections 29 and 30.

[4] But no one would have expected a fresh revision of rents in favor of the landlords if the movement of prices had been upward instead of downward.

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of difficulties that ran ever stronger against it. The legislation of 1887 was avowedly but an expedient to gain time to mature a comprehensive scheme of purchase.[1]

IV. *Legislation facilitating the Conversion of the Tenant into a Proprietor.*

As a possible solution of the Irish land question, the system of peasant proprietorship had been constantly discussed since the time of the great famine. But the necessity of financial aid from the state in effecting the transformation had called up serious objections, both theoretical and practical. John Bright, long an earnest advocate of peasant proprietorship, was responsible for the first deliberate experiment, in the act of 1870, looking to the advance of money to tenants for the purchase of their holdings. The Irish Church Act of the preceding year[2] had indeed given a preference to tenants in the sale of glebe lands of the disestablished church, and had made the terms of payment particularly easy; but the creation of small proprietors was merely an incident of the measure. We have already seen[3] what progress had been made by 1881 in the development of sentiment favorable to tenant purchase. Between that year and 1885, under pressure of the National League's agitation, the government was forced to devote much attention to the subject. A bill was introduced in 1884 by Mr. Trevelyan, the Irish Secretary, embodying a comprehensive purchase scheme,[4] but the Liberal government was unable to pass it; and the net result of government action up to 1885 was a failure to effect any important increase in the number of peasant owners. An examination of the principles which were at issue in the projects already in operation will be the best preparation for an appreciation of the more successful acts of later years.

Perhaps the most fundamental question in connection with

[1] *Cf.* Balfour, Hansard, vol. cccxvii, pp. 373, 389.
[2] 33 and 34 Vict. c. 42, sects. 34, 52.
[3] See p. 509.
[4] Hansard, vol. cclxxxviii, p. 1570.

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any purchase scheme is that as to whether compulsion should be employed in carrying it out — whether the landlord should be obliged to sell, or, on the other hand, the tenant (or the state in his behalf) be obliged to buy. The answer to this question in all the legislation thus far has been negative. Compulsory expropriation, indeed, was scarcely suggested in seriousness before 1881. The principle adopted had been merely that of aiding the tenant in carrying out a contract of sale voluntarily made with the landlord. In 1881 the Land Leaguers insisted that real freedom of contract on the tenant's part was as impossible in connection with purchase as in connection with rent, and that any stimulus to the tenants to purchase would only to that extent strengthen the hands of the landlord in exacting an exorbitant price. But Mr. Gladstone's government felt that they were doing all they cared to in securing to the tenant his own interest in the land, without dictating the terms on which he should obtain the landlord's interest also.

Assuming, then, that the agreement as to the sale and the price to be given are reached voluntarily by the two parties, the next question is as to the proportion of the purchase price to be advanced to the tenant by the government. Two principal considerations entered into the answer to this question: first, the degree of stimulus that it was expedient to give to tenants to purchase; second, the security for repayment of the advance. It seemed axiomatic that only the best kind of tenants — the thrifty, progressive element, who had some savings accumulated — ought to be encouraged to purchase. They alone would be valuable to society as owners of land; they alone could give adequate security for a return of the funds advanced. An offer of the whole of the purchase money would be too powerful an allurement, and would draw into the movement a mass of undesirable purchasers, who, in struggling to repay the loan, would only involve themselves hopelessly and in the end would find in their failure a new source of disaffection toward the government. The Irish Church Act authorized the advance of three-fourths of the purchase price as fixed by the commissioners. In 1870 the "Bright Clauses" advanced only two-thirds of the

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price,[1] but at a somewhat lower rate of interest. Mr. Gladstone in 1881 increased the proportion again to three-fourths, though the Bessborough Commission recommended four-fifths. It is to be noted that the tenant right guaranteed to the occupier in 1881 constituted a basis for credit which had not existed before, and contributed so much to the security of any debt contracted by him.

Next, as to the conditions of repayment imposed upon the purchaser. From the beginning the manner of repayment prescribed had been a terminable annuity, covering both principal and interest, payable in semi-annual instalments, and thus assimilated to rent in its effect upon the tenant. The length of the term required to extinguish the debt was fixed in view of the same considerations that operated in fixing the amount advanced. A long term meant low interest and hence a greater inducement to the tenants to purchase. In practice, the tenant would be influenced chiefly by the relation which the semi-annual instalment bore to the rent he was paying. The legislation we are considering never went to the extent of insuring that the burden on the tenant should be less than that of the rent. Under the Irish Church Act, the maximum term of repayment was thirty-two years, and the instalments were at the annual rate of about five and one-third per cent on the advance.[2] By the "Bright Clauses" the term was fixed at thirty-five years and the rate of the annuity at five per cent. Under the act of 1881 these figures were retained, though many Liberal members and all the Parnellites favored a much longer term and a lower rate.[3] At that time the anti-rent agitation of the Land League contributed much to the timidity of the government. That the state should be regarded and treated by the Irish farmers as the landlords were treated then, was a contingency that was to be

[1] An amending act in 1872 changed this to two-thirds of the value.

[2] With the interest on the other fourth of the purchase money, and the taxes now to be borne by the purchaser, this made his position considerably worse than when he was tenant. For the desperate struggles of the purchasers to keep up their instalments, see Richmond Commission, Report of Assistant Commissioners, Parl. Papers, 1881, vol. xvi.

[3] *Cf.* Russell's motion to make the term 52 years. Hansard, vol. cclxiii, p. 404.

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avoided at all hazards. The risks, political as well as financial, that had from the outset been seen to be connected with any scheme that substituted the state for the landlords, were made by the existing situation particularly conspicuous. It was felt, therefore, that the shorter the duration of such risks, the better it would be for all parties concerned.

Such in general were the principles that had been in play as to state-aided purchase up to 1885. Of the three acts in operation but one had been in a fair measure successful. The Bessborough Commission reported in 1881 that under the Irish Church Act, 6057 of the 8432 holdings sold had been taken by the tenants, and the instalments had been kept up with a very small percentage of arrears — £5914 in a total advance of £1,674,841. The "Bright Clauses" were admitted to be an almost total failure.[1] As late as 1887 the Cowper Commission reported that only 702 sales had been made under their provisions. The chief causes of the failure were found in the difficulty of forming estates into lots to suit purchasers, while giving due care to the interests of incumbrancers, and in the overcautious administration of the act, through which the conditions as to security were made very onerous to the purchaser. For the purchase clauses of the act of 1881 but little greater success was forthcoming. Only 731 sales had been made under them up to 1887. As to the cause of this failure, a Lords' committee in 1882 ascribed it to the absence of sufficient inducement to the tenant to become owner.[2] His annual payments would exceed those under the old relation, and his rights would be little if any greater than those he enjoyed under the act as tenant. A secure tenure at a reduced rent for fifteen years was too favorable a situation to be given up without consideration. This report, it will be seen, is a manifestation of landlord discontent with the dual ownership recognized in 1881. Such discontent became very pronounced as the years rolled on, and it added Conservative to Nationalist pressure for a purchase meas-

[1] See Bessborough Commission's Report, sections 87–90, adopting the conclusions of a special committee of the Commons in 1877–78.

[2] Parliamentary Papers, 1882, vol. xi.

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ure that would induce tenants to buy. The cardinal feature of such a measure, it was maintained, must be a term of repayment that would reduce the annual demand on the purchaser to a figure appreciably below the rent he was paying.

The legislative results of the situation thus produced were the successful measures of purchase known as the Ashbourne Acts of 1885 and 1888,[1] and the extremely comprehensive scheme of Mr. Balfour passed in 1891. The first Ashbourne Act was passed with very little opposition by Lord Salisbury's government during its short lease of power in the summer of 1885. The reason ascribed for the introduction of the bill was, as in the case of Mr. Trevelyan's bill of the previous year, the utter flatness of the market for Irish land. "At the present moment," said Hart Dyke, in the Commons, "land is practically an unsalable commodity in Ireland."[2] Whether this was due to the anti-rent agitation which had flourished since 1879, or to the agricultural depression just making itself felt, or to both, the situation was one that should be changed. The Nationalists called the measure a "landlords' relief bill." But since the purpose of the agitators to make the tenants the only possible purchasers of Irish land[3] had succeeded, it was thought to be a small mercy to enable the landlords to sell to them. The inducements offered to the tenants in the act were all that the most liberal advocates of state-aided purchase had seriously proposed. The whole amount of the price agreed upon was advanced and the term of repayment was fixed at forty-nine years, the rate being four per cent on the advance. This insured to the purchaser a semi-annual instalment very considerably less than his previous rent.[4] On the other hand, the interest of the

[1] 48 and 49 Vict. c. 73; 51 and 52 Vict. c. 49.

[2] Hansard, vol. ccc, p. 1067. The Duke of Argyll pointed out that only the landlord's interest was unsalable, while tenant right was commanding great prices. Hansard, vol. ccxcix, p. 1356.

[3] *Cf.* Dillon's boast in 1890: "Owing to boycotting, owing to combination, owing to agitation, there is no purchaser of the land of Ireland except the tenant; . . .' if the tenants only wait and are patient and hang back a little, the price will go down to a fair value." Hansard, vol. cccxliii, p. 1372.

[4] At the prices that prevailed outside of Ulster in the first two years of the act's operation, the reduction amounted to about one-fourth. Cowper Commission's Report, section 21.

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treasury was guarded by a provision for a guarantee deposit by any person (in practice, of course, this meant the landlord) of one-fifth of the amount advanced, to be retained on three per cent interest until the purchaser's paid-up instalments should equal the deposit.

This act of 1885 was put on the statute book merely as an experiment,[1] and the limit of advances under it was fixed at £5,000,000. The success of the experiment was very quickly manifested. Within less than a year and a half over five thousand applications for loans had been made,[2] calling for £2,446,946; and by 1888 the appropriation had been exhausted. In introducing a bill to extend the appropriation to £10,000,000, the attorney-general for Ireland stated[3] that 14,338 agreements to purchase had been made under the act, and arrears in the payment of instalments had amounted to only £1100 out of £90,000. Though the Gladstonians and Home Rulers, on political grounds, opposed the proposition to extend the act, the bill was passed December 24, 1888, and continued a successful career till merged in the great act of 1891. Meanwhile the legislation of 1887 had embodied a number of provisions[4] tending to mitigate the difficulties still existing in the process of ready transfer, and in particular had reduced to the terms of the Ashbourne Act the less favorable conditions under which the purchasers under previous legislation were paying their instalments.

The act of 1891 is substantially a further extension of the Ashbourne Act, with modifications and improvements in certain particulars. Purchase and sale are permissive, not compulsory. The advance covers the whole of the purchase money, and the terms of repayment are based on the rate of four per cent for forty-nine years. It is in the matter of security for the treasury that the most novel and striking feature of the measure is to be found. Ever since purchase on a large scale had occupied the attention of the government, the question of securities had

[1] *Cf.* Salisbury, Hansard, vol. ccxcix, p. 1353.
[2] See Cowper Commission's Report, section 11.
[3] See Annual Register, 1888, p. 207.
[4] 50 and 51 Vict. c. 33, pt. ii.

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constituted a most difficult problem. So long as purchasers were numbered only by hundreds, as under the earlier acts, or advances strictly limited, as in the Ashbourne Acts, the strain on the imperial credit was not so important; but in view of any scheme that would involve hundreds of thousands of transactions, the ultimate interests of British fundholders and taxpayers demanded elaborate consideration. This fact had been keenly appreciated by Mr. Gladstone's government, and its two abortive measures had both proposed solutions of the problem which looked to throwing the chief burden on Irish, as distinct from British, taxpayers. The Trevelyan bill in 1884, which contemplated advances up to £20,000,000, provided that defaults in instalments should be made good from the county cess; and to avoid burdening the taxpayers of the counties without their consent, a scheme was proposed by which each advance for purchase was subject to the approval of a local authority of a popular character.[1] In the bill which Mr. Gladstone coupled with his Home Rule Bill in 1886, he made compulsory the purchase by the Irish government of all estates offered by landlords, and lent the imperial credit for the purpose. The first limit set was £50,000,000, but the total amount necessary, it was conceded, would possibly reach £113,000,000. To secure the treasury, he provided a first charge in its favor on the whole revenue of the Irish national government.[2] It was of course not open to Mr. Balfour to adopt this latter form of security. But if he could not charge the revenues of a national Irish government, he was entirely at liberty to fall back upon Trevelyan's principle and use the local funds. This he did, but without the concession of any control by the local authorities.

The scheme of securities in the act is complicated and very ingenious. First, to protect the purchaser against the consequences of bad seasons or other such contingencies that render payment of his instalments impossible, there is instituted a Tenant Insurance Fund, by requiring the payment for the first five years of something more than the normal annuity, the

[1] *Cf.* Trevelyan's speech, Hansard, vol. cclxxxviii, p. 1510.
[2] Hansard, vol. ccciv, p. 1793 *et seq.*

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amount thus accumulated to be used in case of default. In the second place the treasury is secured by what is called the Guarantee Fund. This consists of (1) certain sums paid annually to the Irish government by the imperial treasury, amounting to about £240,000; (2) imperial contributions for local purposes, including the rates on government property and grants in aid for education, poor relief, *etc.* This second item is called the contingent part of the Guarantee Fund, and is not to be resorted to until every other security is exhausted. The limit of the appropriation for advances is fixed at the capitalized value of this contingent part — estimated to be about £33,000,000. In addition to the securities described there is still the landlord's guarantee deposit of one-fifth of the advance, as in the Ashbourne Act,[1] and another minor item.

In this arrangement, of which I have given by no means a complete account, Lord Salisbury's government believed that it had devised a satisfactory means for using, without risking, British credit in settling the Irish land question. So far as human foresight can effect it, it certainly seems that the British taxpayer is secure, except in the one contingency of a general and persistent strike by the purchasers against the payment of the instalments. But that situation can only arise under circumstances of widespread social and political disorganization, for which no measure of peaceful legislation can provide.

One feature of the law of 1891, which I have not as yet mentioned, was regarded by Mr. Balfour as particularly important and as likely to contribute very much to a simplification of the general situation. This was the part dealing with the so-called "congested districts." The barren regions on the west coast of Ireland, peopled by communities of small tenants who in the best of seasons could not live on the produce of their holdings if no rent whatever were exacted, have always furnished the most harrowing incidents in the repertory of agitation against landlords. That these communities could not logically be included in a general settlement of land ownership, had been realized by Mr. Gladstone in 1886. The Conservative government

[1] See p. 517.

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in 1891 acted upon this idea, and after defining "congested districts,"[1] provided them with an entirely distinct scheme of improvement. The purchase clauses were to apply here only in a modified form, and a board was established to look after the peculiar interests of these regions and in particular to devise means for increasing the size of the holdings and for developing local industries that may afford some means of support for the population. That the treatment of these districts was not earlier differentiated from that of the agricultural regions at large, is a striking illustration of the lack of close analysis that has always characterized British attention to Irish affairs. With the distinction clearly drawn, it will be impossible in the future to make the wretchedness of a three-acre tenant in a Donegal hovel the basis of a demand for reduced rent or instalments on a fifty-acre holding in Tipperary; or on the other hand to crush the advocate of peasant ownership for Ireland in general by a sneer at the kind of owner that could be made out of a Connaught cottier.

That the act of 1891 will create peasant proprietorship throughout Ireland, or that such a system, if created, will settle the Irish land question, no one familiar with the history of that question will venture to predict. The statistics of the Ashbourne Acts indicate that the development of the system will be a work of some time. Up to December 31, 1890, there had been 24,223 applications for advances — roughly 5000 annually since the first act went into operation.[2] Considering that there are some 600,000 holdings in Ireland, the end would seem to be far in the future. A suggestive fact is that over half the applications (12,282) were from Ulster. This promises well for the superior character of the purchasing tenants, but as to the settlement of the land agitation, it must be remembered that Ulster has had little to do with the trouble. Default in payment under the purchase act continued to be rare. Only twenty-

[1] A district may be declared to be a congested district when the proportion of the ratable value of the land to the population is less than £1 6*s*. 8*d*. per head.

[2] *Cf.* summary of the working of the Ashbourne Act in *The Times* (London) weekly edition, February 13, 1891.

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seven defaulters had been sold out up to the end of 1890, and in only seven cases was resort necessary to the guarantee deposit to discharge unpaid instalments. It is very doubtful, however, if purchases under the act of 1891 continue at the same rate as under the previous acts, or if instalments are as regularly paid.[1] The new law is peculiarly open to attack on political grounds, and it is not to be supposed that the lesson which the Land League inculcated as to the political utility of the land question will soon be forgotten. The mortgaging of local revenues without the taxpayers' consent opens a tempting issue to the politician. It was questionable policy to offer such an issue to the emotional, undisciplined democracy which the agitations of O'Connell and Parnell have called into conscious existence in Ireland.

WM. A. DUNNING.

[1] At the opening of the session of Parliament in February, 1892, the government was obliged to admit that applications for purchase under the new act had been relatively very few, but Mr. Jackson, the Irish Secretary, explained that the rules for procedure had not yet been formulated. So good a supporter of the government as *The Times* regarded this explanation as unsatisfactory.

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OUR TWO GREAT PARTIES: THEIR ORIGIN AND TASKS.

II. The Republican Party.[1]

WHENEVER a large body of citizens is convinced that the most urgent need of the state cannot be provided for through any existing party, the time has come for the organization of a new party. This was the case in 1854. There were at that date hundreds of thousands of thoughtful and patriotic Northern citizens who held that the greatest need of the United States was the restriction of slavery to territory where it was already established. The desire to restrict slavery was not new. It had existed from the founding of the republic, and in two instances, namely, the Ordinance of 1787 and the Compromise of 1820, had shown itself a decisive force in shaping public policy. What was new in 1854 was the discovery that the barriers against the extension of slavery on which full reliance had been placed hitherto had become untrustworthy. The event that did most to bring about this discovery was the repeal of the compromise which in 1820 had prohibited slavery in all the vast unsettled region north of the line of 36° 30′. Even more alarming than the opening of Kansas and Nebraska to slavery which this repeal effected, was the doctrine advanced by its supporters that the national government had no right to prohibit slavery in any territory. But what could be done? The first impulse was to restore the abrogated compromise. This, however, could be accomplished only through the championship of a powerful party; and from no one of the parties then existing could this championship be secured.

The Democratic party could not give it; for its Southern wing was altogether pro-slavery, while the masses of its Northern supporters had no aversion to slavery. Neither could the

[1] For "The Democratic Party," see this Quarterly, VI, 593 (December, 1891).

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already moribund Whig party give the required championship; for it also had a Southern pro-slavery wing; and although a majority of its Northern members were, largely on political grounds, opposed to slavery, they were at the same time thoroughly imbued with the doctrine that the preservation of the Union was the highest of political duties, and that compliance with the demands of the South was the only way by which the Union could be preserved. By habit and tradition the party was altogether unfitted for the heavy task under consideration. Its great achievements had been in the line of compromise. The fame of its most popular leader, Henry Clay, was based in the main on his services as architect and promoter of the compromises of 1820, 1833 and 1850. Moreover, through its support of the "gag-laws" and of the Fugitive Slave Act of 1850, the party had alienated beyond recovery the good will and confidence of that influential body of Northern citizens whose antagonism to slavery on moral grounds made them comparatively indifferent to political considerations. Equally unfavorable was the outlook when the supporters of slavery-restriction turned to the newer parties of that day. The Know-Nothings were at best an ephemeral party, whose chief political service was to aid in the transition from the old party system, based on maintaining the Union by compromise, to the new system, based on the sectional struggle for supremacy. They were chiefly intent upon substituting nativism, an altogether minor issue, for the real issue, which was slavery. The Free Soil party was composed in the main of political Abolitionists and disaffected Democrats. Its official utterances were strongly antagonistic to slavery. In its general doctrines, however, it was quite too democratic to become the party of the North. In some of its conventions it even went so far in this direction as to sanction the views of state sovereignty set forth in the Virginia and Kentucky Resolutions.

Under such circumstances it was necessary to form a new party; for in no other way could the supporters of slavery restriction be true to their sense of public duty. The organization of the Republican party was begun during the agi-

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tation over the Kansas-Nebraska Bill,[1] and was substantially completed in time for the national campaign of 1856. Its members were drawn from all parties. Of necessity it was confined to the North — it was the party of the North. The fact that resistance to the extension of slavery was the main feature of early Republican policy, accounts for the widely prevalent view that in the beginning the new party was mainly if not purely an anti-slavery organization. If this were true, it would be difficult to explain any considerable portion of its career, and altogether impossible to trace to a common underlying principle the varying lines of policy which it has pursued at different periods, or to account for the prosperous existence of the party long after the definite settlement of the question of slavery. The truth is that only in a secondary sense was the Republican party then or later an anti-slavery organization.

Under the influence of different labor systems there had grown up in the North and the South two distinct types of civilization. In the North labor was free. The social as well as the political structure was truly democratic. Of the spirit of caste there was scarcely a trace. The section possessed a highly developed and widely extended educational system. Its inhabitants were noted for industrial energy. Its manufacturing and commercial interests were extensive. Its population was largely urban. It had great wealth. It was in close and sympathetic relations with civilized Europe. Its merit was that it placed the highest prizes within reach of the humblest; its defect, that it made too much of the material goods of life. In the South, labor was enslaved. The social structure was aristocratic. The planters and the professional classes formed a true and in some respects a highly meritorious aristocracy, whose superiority in intellect and character gave them the undisputed social and political leadership of their section. The masses of the whites were poor and lacking in thrift and enterprise. The educational system was inadequate. There was little immigration. Agriculture, pursued by methods which steadily and

[1] See Wilson, Rise and Fall of the Slave Power, vol. i, pp. 409–413; Julian, 143–144; von Holst, V, 130.

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rapidly impoverished the soil, was the one great industry. In respect to the social and political movements of the progressive outside world, the position of the South was that of growing isolation and antagonism. The merit of this system lay in the fine and strong traits which it produced in the men and women of its higher classes; its defect, its vice, was the malign influence which it exerted on the character and fortunes of the masses of the Southern whites.

As these two types of civilization developed, the differences between them became more pronounced and difficult of adjustment. Before the middle of the century the discussion of national questions had made it clear that in the most essential points the interests and opinions of the North were in direct conflict with those of the South. The public policy which best suited the needs of the one was believed by the other to be hurtful. At the beginning of the second half of the century the divergence had already become so wide as to make a durable reconciliation impossible. The greatness of the difference between the sections is best measured by the differences between the ideals which they cherished. Each section had its own peculiar type of gentleman. Neither fully understood the ideas of the other in respect to honor, justice and obligation.[1] But as the possession of common ideals is the most solid basis of unity between citizen and citizen as well as between man and man, so the possession of unlike and conflicting ideals is the certain breeder of chronic discord. The conflict — about to become war — between these two types of civilization was the fact which dominated the political situation at the birth of the Republican party. In the presence of this greater struggle the strife between class and class ceased. The party system of the country was reorganized on a sectional basis. In the South the Democratic party gradually absorbed the Whigs and Know-Nothings and made itself the party of that section — the champion of its civilization. The Republican party drew to itself from each of the old parties the elements

[1] See the comments of von Holst on the discussions in Congress which followed the attack on Sumner, V, 327.

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which were most distinctly Northern and thus became the party of its section — the party of the North. Its first great task is best described in the words of Lincoln:

> "A house divided against itself cannot stand." I believe this government cannot endure permanently half slave and half free. I do not expect the Union to be dissolved; I do not expect the house to fall; but I do expect that it will cease to be divided. It will become all one thing, or all the other.[1]

The work immediately before the new party was to save the Union by making it all free.

Whether judged from the standpoint of national welfare or from the higher standpoint of world-progress, the record of the Republican party while engaged in this task is singularly creditable. It is true that in the later stages of the work it followed unwise counsels and perpetrated serious mischief. But as a whole, the history of the Federalists from 1787 to 1797 is probably the only chapter in the history of parties which, in respect to brilliancy and usefulness, can be compared with the record of the Republican party between 1861 and 1872. During the fourteen years in which the Republican party had full control of the government, it not only restored the broken Union, but — what is perhaps a severer test of political capacity — organized it anew, and on a durable basis.

The first work of the new party was to propagate the doctrine of slavery restriction. While engaged in this its conduct was marked by discretion and good sense as well as by courage and moral earnestness. It was aided by the course of its enemies. The Ostend Manifesto, the efforts of Pierce and Buchanan in co-operation with the "border ruffians" to establish slavery in Kansas against the will of its inhabitants, the attack on Sumner, the Dred Scott decision, the enforcement — sometimes brutal and always hateful — of the Fugitive Slave Act, helped much to make it clear to the North that the conflict between itself and the South was not only "irrepressible" but mortal. The event, however, to which the party owed most was the introduction of the doctrine of squatter sover-

[1] American Orations, III, 3, 4.

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eignty; and its greatest benefactor outside its own ranks was Stephen A. Douglas. The course of this leader in connection with that doctrine gave in 1854 the decisive impulse to the party's organization. The discussion of that doctrine with Douglas in 1858 revealed Abraham Lincoln, and at the critical moment gave to him — immeasurably the fittest of all its candidates — the leadership of the party. Finally, when its uselessness to slavery became apparent, it was the rejection of squatter sovereignty by the South and the quarrel of Southern leaders with Douglas that in 1860 divided the Democratic party, made Lincoln President, precipitated secession and placed the Republicans in control of Congress.[1]

When, early in 1861, the Republicans found themselves in power, the problem which they had first to solve was not how to deal with slavery, but how to save the Union. The situation was difficult in the extreme: on the one side was a united, resolute, desperate South; on the other, a divided, irresolute and yet optimistic North. There was only one course which gave hope of preventing a permanent separation. The South claimed, and the Democratic half of the North believed, that the immediate cause of secession was Republican hostility to slavery. Hence, in order to secure a sufficient degree of unity in the North and to win the border states to the support of the national cause, it seemed expedient to drop the question of slavery. This was done. The majority of Republican representatives voted for an amendment to the constitution which would have made it impossible for the national government ever to interfere with slavery in the states. The territories of Colorado, Dakota and Nevada were organized without prohibiting slavery.[2] The Union commanders who under the guise of military measures aimed the first blows at slavery were promptly rebuked. The Crittenden resolution, which assured the South that the war was waged to restore the Union just as it was previous to secession, that is, without any purpose of interference with slavery, received in July of 1861 the support of a large majority

[1] Of course I speak here of the immediate, not the remote, cause.

[2] See Blaine, Twenty Years of Congress, I, 270, 271; II, 677, 678.

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of Republican congressmen. The true attitude of the party at the outbreak of the war was clearly defined in the famous letter dated August 22, 1862, of President Lincoln to Horace Greeley:

> As to the policy I 'seem to be pursuing,' as you say, I have not meant to leave any one in doubt. I would save the Union. I would save it in the shortest way under the constitution. The sooner the national authority can be restored, the nearer the Union will be the Union as it was. If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them; if there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object is to save the Union, and not either to save or destroy slavery. . . . What I do about slavery and the colored race, I do because it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union. I shall do less whenever I shall believe it hurts the cause; and I shall do more whenever I believe doing more will help the cause. . . . I have here stated my purpose according to my views of official duty; and I intend no modification of my oft-expressed personal wish that all men everywhere could be free.[1]

As the war progressed the North grew more united, while public opinion advanced steadily to the position that slavery was the true cause and chief support of secession. When it became clear that this position had been reached, the Republican party, leading rather than following its prudent chief, resumed its earlier warfare against slavery. In the national convention of 1864 the party declared

> that as slavery was the cause and now constitutes the strength of this rebellion and as it must be, always and everywhere, hostile to the principles of republican government, justice and the national safety demand its utter and complete extirpation from the soil of the republic; and that while we uphold and maintain the acts and proclamations by which the government, in its own defence, has aimed a death-blow at this gigantic evil, we are in favor, furthermore, of such amendment to the constitution, to be made by the people in conformity with its provisions, as shall terminate and forever prohibit the existence of slavery within the limits or jurisdiction of the United States.[2]

[1] Greeley, The American Conflict, II, 250.
[2] Stanwood, Presidential Elections, p. 240.

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To this programme the party held without deviation until, late in 1865, the thirteenth amendment became part of the constitution.

Then came a task in some respects more delicate and difficult than that of saving the Union — the task of its reconstruction. The disposition to employ force which war always fosters, the self-confidence which victory begets, the loss through the assassin's act of Lincoln's wise and powerful leadership, the rashness and self-will of his successor, the impolitic course of the South towards the freedmen, — all these circumstances conspired to lead the party to the adoption of measures which were inconsiderate and which have proved the source of lasting evils. The formal disruption of the Union in 1860 and 1861 was made possible and in a sense inevitable by the earlier disruption of the moral bonds which for a century had held North and South together.[1] The cessation of hostilities could not of itself bring about a true restoration of the Union; that could be effected in one way only, and that was, through the knitting together of these same broken moral ties.

The condition of the South at the close of the war was one of peculiar difficulty and peril. The section was exhausted, impoverished, discouraged; its labor system was destroyed; its industry was paralyzed. In this situation the South needed — as no prosperous community ever can need — the best services of its most capable citizens. The work of restoration could be well done only by those who belonged to the suffering community and were its natural leaders. Outsiders, however well disposed, could not fill their place. But under the influence of the untoward circumstances above mentioned these considerations were overlooked. In most of the Southern states the classes which possessed the highest political capacity — the only classes which had had any effective political training — were excluded from all share in the work of reorganization. This task, delicate and difficult beyond all others, was committed to the freedmen, who had had no training as citizens, to the loyal

[1] It seems to me that we may justly date the clear beginning of the American Union from the Peace of Paris in 1763.

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whites, in most states a class comparatively small and without experience in politics, and to a few immigrants from the North, some of whom were unscrupulous adventurers. The natural results followed. Those states which came most fully under the "carpet-bag" régime were soon reduced to a pitiable condition. Their legislative history for the period under consideration is little else than a record of plunder. Then came the terrible reaction through which the white people of the South regained control of their local affairs. The means they employed were cruel and demoralizing; but the responsibility for the use of such means rests at least in some measure on the party that forced upon them an intolerable situation. If, in a Northern state, the native-born, the educated and the reputable citizens should be deprived of political functions, and the control of government should be put into the hands of the pauper, the illiterate and the vagabond elements, the situation would not be worse than that of a considerable portion of the South during the most trying years of the period of reconstruction. In some respects it would be better; for there is no oppression which galls like that exercised by those who have been slaves over those who were once their masters, and there are no circumstances under which maltreatment is so exasperating as when an outside power — in this case, the national government at the instigation of the Republican party — prevents the victim from defending himself against a weak assailant; moreover, there is no considerable class in the North so incapable, in a political sense, as were the freedmen of the South in the first years after emancipation. No people worthy of respect can permit itself to be ruled by its least capable classes; and yet that is precisely what the Republican party demanded of the South when it undertook to place the freedmen in control of the Southern state governments. The gravest evils which resulted from this policy were not the misdeeds of the "carpet-bag" governments nor the desperate methods by which these governments were overturned, but the antagonism between the two races which it kindled, the unnecessary and greatly injurious increase of sectional bitterness, and lastly, by

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the production of a "solid South," the maintenance there long beyond the natural period of the hurtful one-party system.

Before the end of General Grant's second term the work of formal reconstruction was completed, and with it closed the first great period in the life of the Republican party. It had fulfilled its mission as the party of the North; it had made the free-labor system of the North the system of the entire Union. Incidentally it had accomplished another task; it had raised the power and prestige of the Federal government to a point which settled for ever the old controversy between state and national sovereignty; and the settlement reached was the one for which Hamilton, Clay, Jackson and Webster had labored.

The question which the party had next to solve was whether there would be a place for it in the new party system which was about to be formed. Just as the earlier change from class to sectional interest as the basis of party had given birth to the Republican party and assigned to it its first task, so now, after the completion of that task and the consequent destruction of the sectional basis, it became necessary to reorganize the party system on the more natural and durable basis of class interest. The gradual disintegration of the sectional basis and the gradual acceptance of the class basis is, I think, the most noteworthy feature in the history of party during the last twenty years. This process began earlier and has proceeded farther in the North than in the South, but in the North it is still incomplete. It reveals itself in the decreasing prominence of sectional issues and in the increasing prominence of issues that rest upon conflicts, real or supposed, between the interests of the different classes. On the whole, the Democratic party is committing itself more definitely to the championship of the farmer and the laborer; the Republican party, to that of the manufacturer and the large capitalist. In the new system there is need of a party to champion the interests of the conservative classes of the whole Union. The Democratic party cannot satisfy this need. In the North it is already the party of the masses; in the South it is destined soon to become so. The predecessors of the Republicans, namely the Federalists and

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Whigs, were the conservatives of the early period. To take up their work and to prosecute it in accordance with the actual conditions of the present, is a task which some party must accept and for which the Republican party has marked qualifications. This task of conservation is but another form of the earlier task. Then the party had to protect the civilization of the North by making the Northern labor system national. It had to fight against slavery and secession. Now it is called upon to protect the same civilization against other foes, — against the alien, the monopolist, the inflationist, the repudiator, the anarchist and many another who would overturn and destroy. If the party can be led to accept its present work as heartily as it did the earlier, there will be no change in its principles and less danger of a change in its fortunes.

It is impossible to trace here the course of the party in its efforts to find and fill the new position. It is sufficient to remark that its advance in this direction has been slow and halting, and that from time to time it has taken backward steps. It has not even at the present day fully emancipated itself from the sectional idea. Very recently it gave general support to the Federal Elections Bill, and its national platform of the present year promises measures of a like nature. The hope which during the reconstruction period influenced its policy far too greatly — that it could secure not only lodgement but control in the South through the colored vote — has been the source of serious blunders. There has never been a time when the party could afford to pay the price which it was necessary to pay in order to obtain this vote.

Looked at from the standpoint of party welfare, the question of greatest present moment is: How can the confidence and support of the naturally conservative classes in the South as well as in the North be won and kept? This is a matter indeed which concerns deeply all good citizens, irrespective of their relations to party. The political health of the country, the outlook for good government and for progress, are dependent in no small measure on the existence of a well-balanced party system. In order that there may be such a sys-

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tem there is need of a strong conservative party. The best things in our civilization, however strongly entrenched they may be in laws and institutions and even in popular regard, are exposed to constant and dangerous attacks, and need therefore a watchful and powerful protector. To affirm the need of a conservative party is not to claim that all the features of the existing order are right and should be permanent. Doubtless some of these which were once highly useful need now to be replaced by other features more in accord with existing and coming conditions. But the public has a deep interest in the methods by which such changes are to be effected. The evils of a bad method of introducing a reform may outweigh the benefits which the reform itself is calculated to bring. Right here we see how a conservative party can render important services: it secures the choice of the most gradual, the least destructive and therefore the best methods of introducing reforms; it resists and prevents pseudo-reforms. Were it not for this unconscious and even unfriendly co-operation of the conservative, the best work of the progressive radical would be accomplished prematurely, at great cost and with but little benefit.

Is the present policy of the Republican party such as to win the confidence and support of those classes, both North and South, which are naturally conservative? So far as its course in respect to public credit and finance is concerned, one may answer in the affirmative. Most of its measures in relation to these important subjects reveal a sense of honorable obligation as well as a clear perception of what is expedient. They satisfy the instinct of the conservative for stability. The position which the party has taken in regard to foreign trade seems to me less satisfactory. It has abandoned the earlier view that protection is useful only during the industrial infancy of a people, for the modern view that a tariff high enough to offset the lower wages of competing foreign producers, and general enough to include all industries which are exposed to foreign competition, should be the permanent policy of the country. In putting this forward as the leading feature of its policy, there is danger that the Re-

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publican party will make itself the party of the protected classes and sections rather than the conservative party of the whole country. The hold which it used to have on its supporters came through the fact that it gave expression to their moral convictions and their love of the Union. The hold which it is now seeking to gain as the dispenser of tariff favors rests largely upon the service which it renders to the pocket. This is a degradation.[1] It is certain moreover that the hold itself is less secure. It is impossible to make a tariff which will satisfy the conflicting interests of different protected classes. It is equally impossible to bestow the benefits of protection upon all of the more important classes.

During the first period of its history the party gained the support of a large proportion of the farmers of the North through its antagonism to slavery and its support of the Union. Neither of these ties is as strong as it used to be. The loyalty of the Democratic party to the national idea is no longer in question. The future relationship of the Northern farmer to the Republican party will be determined in a higher degree than before by the way in which the tariff affects his economic interests. There are signs that the influence of the "home market" idea is losing its hold upon him. A large number of farmers both East and West are coming to believe that their share in the cost of protection is larger than their share in its benefits. They do not understand why they should be taxed in order to swell the profits of industries which, without protection, would pay better than farming can be made to pay. When told that this is done in the interest of the laborer, their reply is that the better way to help the laborer is to tax him less; that the wages which farmers have to pay are already unreasonably high; that when just allowance is made for the care and self-denial which a farmer, especially when dependent on borrowed capital, must exercise, as well as for the thought, devotion and number of hours that he gives to his work, his

[1] Compare, in respect to the motives appealed to, the address of Governor McKinley — one of the best of American citizens — at the recent national convention, with any typical utterance of the great leaders of the early period of the party.

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return is actually smaller than that of the laborer he employs; that if the farmer produces more, it is because he works longer, harder and more intelligently; that if he saves more, it is because he spends less.

Without question the party should modify its policy towards the South. Southern ill-will on account of its agency in the overthrow of secession and slavery would have subsided long ago but for the attempt during the reconstruction period to make the negro the ruler of the South, and later, through such measures as the Federal Elections Bill, to give him the ascendancy in those states and districts where he outnumbers the whites. The race problem is indeed a difficult one. Its settlement, I venture to think, can come in one way only, and that is through the establishment of confidence and good-will between the colored people and their white neighbors. A careful study of an average Northern community will show that its moral health and prosperity rest to a great degree upon the influence of its higher over its lower class — of its wisest and strongest members over its weakest. This influence can operate only when the two classes are in friendly relationship. If this relationship is broken by bringing the two classes into conflict, the influence of the higher class for good is destroyed, or rather, it changes to an influence for evil. The lower class, instead of receiving inspiration and encouragement, become envious and embittered. The statement that the negro is not allowed to vote is true; but the answer to this is that he is not yet ready to exercise that right to his own profit or to that of the community in which he lives. His attitude toward the liquor and lottery questions confirms this view. Moreover the attempt to enforce this right by means of the national government can only serve to postpone the day when the negro will be fit for the ballot, and when the Republican party, by winning the confidence of the conservative classes of the South, can become in the fullest sense a national party.

ANSON D. MORSE.

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REVIEWS.

The Elements of Politics. By HENRY SIDGWICK. London and New York, Macmillan & Co., 1891. — 8vo, xxxii, 623 pp.

In this long-expected work, Professor Sidgwick completes his triad on the moral sciences. At the same time he marks an epoch in English political philosophy, by presenting the first systematic and comprehensive treatise on the subject since Locke — it might almost be said, since Hobbes. His own claim that the void he fills extends no further back than Bentham is modest rather than accurate; for while it will be readily admitted that that fecund thinker wrote much on politics, his productions touching that special topic can hardly be regarded as systematic.

Since the days of the French Revolution English thought has been chary of committing itself to theories of government. The Germans, charmed with Rousseau's *volonté générale*, have devoted libraries of solemn volumes to psychological and metaphysical fantasies about the state, which has been refined into a mere form of thought. But the Britons have never left the ground of hard practicality. They have had little to say about the *begriff* and the *idee* and the *wesen* of the state, but they have written much on the suffrage, on representation, on the methods of administration. Professor Sidgwick's point of view is entirely characteristic of his nationality. He avows himself the follower of Bentham and Austin and Mill. The state with which he undertakes to deal has no profound metaphysical character or significance; its essence is merely the objective fact, obvious to any one, that a relation of habitual command and obedience exists between two bodies of concrete individuals. Assuming this relation, the problem of politics is simple: How shall the incidents of this situation be made to conduce to the greatest happiness of the individuals concerned? Such a definition of the field of work excludes many interesting questions, while at the same time it gives a greater definiteness to the discussions.

Professor Sidgwick's method professes to be exclusively deductive. He doubts that history can give much aid in the problem he seeks to solve. A close logical deduction from accepted principles of human nature is all that he attempts. His criterion of "accepted principles," however, reveals a faith in historical development; for his standard is the judgment of civilized peoples, particularly those of Western Europe. In this method there is obvious that suggestion of *petitio principii* which

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Mill finds in all deductive reasoning; for the "common sense" of Western Europe is but a generalization from facts among which political institutions form an important element. As a matter of fact we find everywhere in Professor Sidgwick's work, along with a most rigorous adherence to the forms of *a priori* reasoning, evidence that the substance of his thought is inductive. While he tries to derive existing institutions from his fundamental principles, he really is conforming the principles to the institutions. It is hard to believe, for example, that his chapter on "Federal and Other Composite States" represents a laborious deduction from the dogmas of utilitarian ethics rather than an intelligent generalization from the constitution of the United States and one or two similar documents. Yet the whole chapter is in terms of the purest abstraction, with but a footnote here and there to indicate that the philosopher ever suspected the existence of any concrete embodiment of his principles. This same characteristic pervades the whole work; and at times it is a little irritating to realize, at the end of a section of supposed universal philosophy, that it is after all only a bit of ephemeral British politics.

Professor Sidgwick divides his work into two parts. In the first, after laying down his fundamental conceptions of politics, which with some qualifications are those of Austin, he considers the functions of government. His standpoint here is that of moderate individualism; but it has for its foundation, not an *a priori* assumption that the principle of individualism is sound, but rather the fact that

> the legislation of modern civilized communities . . . is in the main framed on an individualistic basis; and an important school of political thinkers are of opinion that the coercive interference of government should be strictly limited to the application of this principle.

The chapters on property, contract, inheritance, remedies for wrongs, *etc.*, manifest throughout the author's success in seeking not "to propound and establish any new principles not recognized in ordinary thought and discussion." His views on socialistic interference by the government and on taxation are well known from his *Political Economy*.

In Chapter XIV he considers the conceptions of state and nation "as currently used." A state is

> a body of human beings, deriving its corporate unity from the fact that its members acknowledge permanent obedience to the same government, which represents the society in its collective capacity and ought to aim in all its actions at the promotion of their common interests.

But this would include nomad tribes; hence some further definition is necessary. Therefore

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we may lay down (1) that in a community that is called a state there is understood to be an effective consciousness of the distinction . . . between the rights and obligations of the community in its corporate capacity and the rights and obligations of the individuals composing it; and (2) that the community so designated is understood to be in settled occupation of a certain territory.

Not a word thus far about the nation. The unity of the state depends "solely on the fact that its members obey a common government." "And I do not think," the author says, "that any other bond is essentially implied in the definition of a state." But he then proceeds to admit that a political society is in an unsatisfactory and unstable condition when that is the only bond, and therefore it is desirable that there should be in addition the bonds implied in the term "nation." The implications of the term cannot be precisely defined. Common origin, common traditions and history, common language or religion, — neither of these can be said exclusively to characterize the nation. The author is forced to believe that the really essential principle is "that the persons composing [the nation] should have a consciousness of belonging to one another, of being members of one body, over and above what they derive from the mere fact of being under one government."

All this seems plausible, but one who has groped about in the realms of German idealism is pained by the simplicity of the whole thing. He misses the *organismus* and the *staatswille* and the *staatsgeist* and the *staatskörper*. It seems as if a great opportunity had been lost when in six hundred pages there is no effort made to enlarge upon the personality of the nation and its necessity and conscious activity in the moral order of the universe.

Part II of the work treats of the structure of government. Here the author works out his conception as to the most desirable form of organization for the government of the modern state, and the proper inter-relationship of its parts. No more in this than in Part I do we find any striking novelty. There is the same calm, judicial consideration of current questions, the same critical but dispassionate balancing of opposing views and the same diffident suggestion now and then of an independent opinion. The author's doctrine, which he generally disguises as "the common sense of the civilized world" or "the best thought of modern times," is in general sound and is always suggestive; but the manner of its presentation will never attract readers. There is a strong suggestion of the later scholastics in the dryness of the style.

Professor Sidgwick accepts the analysis of governmental functions into legislative, executive and judicial, with the proper qualifications, and regards as desirable the substantial independence of the corresponding organs. In the relation of legislature to executive he finds

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the criterion of the different types of constitutional government now prevailing, and his classification shows a modification of Bagehot's. The normal form, of which there is no example in existence, he takes as that of an executive appointed by the legislature and dismissible at its will, and this he names "simple parliamentary government." The form exemplified by the German system, in which a considerable degree of independence is retained by the executive, he styles "simple constitutional monarchy," and that embodied in the English system he distinguishes as "English parliamentary government." With the German system he has little sympathy, and a careful balancing of advantages and disadvantages in the English leads him to an apparent preference for a modification of that contained in the constitution of the United States, which he designates as the system of a "periodical executive." While his own nomenclature is not especially happy, his objection to that adopted by Bagehot seems valid:

> I have not been able to use Bagehot's conceptions of "Cabinet Government" and "Presidential Government" . . . since they seemed inevitably to mix up two questions which I wished to keep distinct, — the question of the relation of the executive to the legislature, and the question as to the more or less monarchical organization of the executive. [Page 430, note.]

Professor Sidgwick's discussion of "Parties and Party Government" will be generally regarded, I think, as one of the solidest and most useful chapters of his work. He fully realizes and clearly points out the evil tendencies of the two-party system. His suggestion of some use of the *referendum* to reduce the dangers of narrow partisan legislation is interesting.

The author reserves for the conclusion of his work the general classification of forms of government and the careful examination of sovereignty. His treatment of the former topic consists in indicating the modern application of Aristotle's theory, and in showing how representative government as now prevalent embodies that blending of aristocratic and democratic elements which the Greek philosopher regarded as ideal. This chapter distinctly loses in clearness through preceding that on sovereignty. In dealing with the latter difficult subject, Professor Sidgwick first disclaims allegiance to the Austinian dogma (Chapter II) and then, on mature consideration, substantially announces the impossibility of any definite solution of the problem. A simple answer to the question where supreme political power resides must almost always be incorrect, he says, unless the meaning of the question is carefully limited; and if the latter condition is fulfilled, the answer is likely to be misleading. The grounds on which he bases this conclusion are carefully chosen, but his thought appears not free from

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confusion. He seems to discern but not consistently to employ the distinction between the legal and the political sovereign. And he places the subjective motives above the definite formulation of the act of will in the conception of a legally sovereign act. An act of Parliament is made neither more nor less the expression of sovereign will, by the fact that fear of disorder influenced its form. An edict of Louis XV was none the less a sovereign law because framed under the influence of the Pompadour. In determining the law of a given country, such considerations are out of place: in determining the constitution, they have to be regarded. This distinction the author does not closely make.

Professor Sidgwick's work, taken as a whole, fulfils the primary purpose which he announces as embodied in it, namely, "to set forth in a systematic manner the general notions and principles which we use in ordinary political reasonings." It is a useful repository of what political science has achieved; but it adds nothing of consequence to the aggregate of these achievements.

WM. A. DUNNING.

History of the Great Civil War. By SAMUEL R. GARDINER. Volume III: 1647–1649. London and New York, Longmans, Green & Co., 1891. — 678 pp.

In the earlier volumes of his masterly work Mr. Gardiner has traced in all its details the history of the process by which the breach between the English crown and the English nation developed till it resulted in civil war. He has now completed the history of the war itself and brought the narrative down to the execution of Charles I. It is a difficult period to treat, not only on account of the complexity of the subject, but because its characters and events have scarcely yet passed beyond the realm of partisan controversy. Mr. Gardiner is, in the proper sense of the term, the first English historian of the epoch. He is the first Englishman who has brought to the study of the subject the patience, the thoroughness and the impartiality which are requisite to the proper treatment of any period of history, especially one so important as this. The same breadth of sympathy, the same exhaustiveness of research and care in the use of authorities is maintained throughout. Yet it has seemed to the reviewer that in the volumes on the Civil War the distinguished author has not shown so complete a mastery of the subject as in the earlier portions of the work. Repeated perusals, especially of the last volume, have failed to leave upon the mind so clear a picture of Cromwell and of Charles, in the later months of his life, as were obtained of Bacon, Coke, Buckingham and Strafford. This may

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be the fault of the authorities, but at any rate it is possible for the reader amid the details of these volumes to lose the thread of the events. He misses here and there the guidance which was furnished by the generalizations and analyses of motive which so distinguished the history in its earlier parts.

Still in none of his volumes has Mr. Gardiner added more to our knowledge of the period than in the last which he has published. In it he has incorporated the results of his study of the Clarke Papers, of the correspondence of the French agents, Bellièvre and Montreuil, of the Roman Newsletters, the Verney Papers, the Hamilton Papers, the Clarendon Collection and a variety of other material which has been used by earlier writers either imperfectly or not at all. His researches among the Thomasson Tracts, which had already yielded so much, have been continued. By careful sifting and especially by due regard to chronological sequence, he has been able to explain many of the hitherto obscure events of the years 1647 and 1648. Of prime importance is the light thrown upon the character of Cromwell. Mr. Gardiner bases his estimate first of all upon the utterances of the man himself. But the publication of the Clarke Papers has made accessible important material of which Carlyle knew nothing. The other contemporary and later authorities, particularly the pamphlets of Lilburne and Wildman, have been subjected to careful criticism. The result has been to show that Cromwell was "no divinely inspired hero or faultless monster, but a brave, honorable man, striving according to his light to lead his countrymen into the paths of peace and godliness." On the other hand he has rescued Cromwell's fame from the charge of hypocrisy, though his conduct was such as to make it "the most natural thing in the world" for his contemporaries to think him a hypocrite. Though a man of the deepest spiritual nature, Cromwell was not an idealist. He cared not for paper constitutions or fine-spun systems. His practical genius demanded a working system, whether it were in politics or religion — an arrangement which would bring the maximum of liberty and moral strength. Therefore he was a man of expedients and compromises. He saw only a short distance ahead, he frequently hesitated and changed his base of operations; yet his eye was ever fixed upon the same goal. When he led the army against the Presbyterian Parliament, it was not because he had ceased to be submissive to authority and a friend of parliamentary government, but because to him the citizen soldiery seemed the only power that could prevent a coalition between Parliament, the King and the Scots, and the consequent ruin of England. In this connection Mr. Gardiner throws much light upon the relations between Cromwell and Cornet Joyce and the events which led to the removal of the King from Holmby House. After Parliament had been

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overawed Cromwell turned to the King, hoping to reach some satisfactory agreement with him. At the same time he was negotiating with Parliament and opposing the extremists in the army. His work throughout 1647 was that of a mediator. He sought by all means in his power to avert war and save the remnants of the constitution. By so doing he incurred the hatred of Presbyterians and Levellers, and was understood by only a few kindred spirits.

But with Charles Stuart compromise was impossible. Cromwell had hoped that after he had been thoroughly beaten it would be possible to come to terms with him. But now Charles would not abandon the militia or the negative voice, least of all the church. He sought to play the parties off against each other and kept faith with none. He was continually seeking foreign aid and, like an uncompromising idealist, falling back upon the "higher law" of the kingship as a justification for his duplicity. It took the Second Civil War fully to convince Cromwell of the impossibility of getting along with Charles. Then he threw compromises to the winds, struck hands for the time with the Levellers and relentlessly pursued the King till he brought him to the scaffold. In that act Cromwell stood as the representative of an independent England and the opponent of all forms of foreign interference.

The result of the struggle was the downfall of the Tudor monarchy and the apparent ruin of the constitution. By the men of that day a compromise which should restore harmony between the crown and the nation could not be devised. If the King had been restored upon any terms acceptable to himself, he would have attempted the restoration of the old system. At the other extreme were the Levellers, who wanted a thorough-going democratic revolution. Between the two stood the Presbyterians, who desired a parliamentary system in both church and state. But in religion they were too intolerant to satisfy the demands of Cromwell and the Independents. Therefore amid the hopeless clash of parties the monarchy disappeared.

In his treatment of the Civil War Mr. Gardiner has kept in view from first to last the compromise which was ultimately reached in 1689. His last three volumes contain the record of the futile efforts which were made to reach such a settlement previous to 1649. Cromwell's work appears then to have been negative in its character, however much he himself may have desired the opposite. He, as the leader of the army, cleared the ground upon which the men of a later generation were to construct the modern system of parliamentary government in England. In the view of the historian that system is itself a compromise, the result of long continued efforts to satisfy the claims of both the crown and the nation.

HERBERT L. OSGOOD.

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The Law and Custom of the Constitution. Part II: *The Crown.* By Sir WILLIAM R. ANSON, D.C.L. Oxford, at the Clarendon Press, 1892. — xxiv, 494 pp.

The first volume of Sir William R. Anson's great work appeared in 1886, and was reviewed in the POLITICAL SCIENCE QUARTERLY (vol. i, p. 501) at that time. Heretofore students of the British constitution, when investigating the questions pertaining to the crown, have been obliged to have recourse to the learned treatise of the great German jurist, Professor Dr. von Gneist, *Das Englische Verwaltungsrecht.* No book in the English language existed, which gave anything like a satisfactory account of the origin, history, prerogatives, powers and procedures of the crown. Students, therefore, who were not masters of the German language were debarred from attaining with any degree of ease, if at all, a satisfactory knowledge of this subject. The labors of Sir William R. Anson have now removed this difficulty entirely. He has made it possible for any student of average ability, by a month's close reading, to secure a full and an accurate knowledge of this most intricate and important part of the British constitution. There is so much to be said in commendation of this great work and so little to be said in criticism of it, that a review of its contents can amount to but little more than a *compte-rendu.*

The author begins by conveying the idea of what the crown is through the conception of the prerogative. His description of the historical development of the prerogative in this chapter is masterly, though the criticism upon Professor Dicey's definition of the prerogative appears somewhat faulty and strained. After fixing the idea of the crown, the author develops the law of the title to the crown and of the relation between the wearer of the crown and the subject. Then follow the chapters describing the bodies which advise the crown — the cabinet, the House of Lords and the privy council — and the governmental departments through which the powers of the crown are executed. Special chapters are devoted to the diplomatic, financial and military administration, in which these most important functions of the crown are treated with great accuracy and much minuteness. The last two chapters of the book introduce the reader to the very interesting problems involved in the relations of the crown to the churches and to the courts. It seems to me that the author has done the best work of his book in the last chapter. It is by far the most satisfactory account of the present judicial system of the British Empire with which I am acquainted. An appendix containing a collection of the forms used by the crown in administering the government is a highly valuable part of the book.

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As I said at the beginning I find little in this truly great work which is open to criticism. Its nomenclature is sometimes a little confusing to an American reader. The author does not make those distinctions between society and the state and between the state and the government, to which Americans are accustomed. But we must remember that the English constitution itself does not realize these distinctions in institutions with anything like the degree of completeness that is to be found in American constitutions.

No library of political science and public law will hereafter be complete without Sir William R. Anson's work.

JOHN W. BURGESS.

The Clarke Papers. Edited by C. H. Firth. Volume I. Printed for the Camden Society, 1891.—442 pp.

William Clarke was secretary to the Council of the Army from 1647 to 1649, and from 1651 to the Restoration was secretary to General Monk and the army of occupation in Scotland. His voluminous papers have till recently lain unused in the library of Worcester College, Oxford. Mr. Firth has now, with great knowledge and care, edited that part of the collection which concerns the events of 1647. It consists of news-letters written from London and from the army, correspondence of the Agitators and debates of the Council of the Army. Taken together these form one of the most important contributions ever made to our knowledge of the struggle between the Parliament and the army, while they for the first time reveal in a clear light the conflicts of opinion within the army itself. They help to clear up a variety of obscure and disputed points in the career of Cromwell. Not the least valuable feature of the collection is a number of hitherto unpublished speeches of Cromwell, enough to fill some thirty quarto pages. The debates also show that Henry Ireton was the ablest political thinker in the army, and that upon him chiefly devolved the task of combating the opinions of the Levellers. The debates are preserved in the form of notes taken by Clarke. These are imperfect and often obscure, but Mr. Firth, by careful transpositions of the text and by the addition of paraphrases in the form of footnotes, has in nearly all cases succeeded in making the meaning of the speakers clear. An elaborate and scholarly preface supplies the historic connections which make the documents intelligible.

The material contained in this volume illustrates more or less fully the events in the quarrel between Parliament and the army from its beginning in March, 1647. Early in June the Council of the Army was formed. It consisted of the generals, together with two commissioned officers and two privates chosen from each regiment. By this act the

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officers identified themselves as fully as possible with the cause of the soldiers, while they aimed to control and moderate the efforts of the Agitators. In the Council the Agitators were represented and their opinions were ably defended. In this volume very full reports of two debates held by this body are printed; the one occurred at Reading July 16 and the other at Putney October 28–30. The importance of these discussions entitles them to special notice, though it be to the exclusion of further reference to the other contents of the volume.

The question under debate at Reading was, whether or not the army should immediately advance on London and force Parliament to grant the demands of the Agitators. Cromwell urged that this should not be done. He desired that an agreement should be reached with Parliament in a peaceful way. While terms of "treaty" between the two were under discussion, it would be well for the army to state clearly its demands and to insist upon an unequivocal reply, but it should not proceed further till all hope of a peaceful settlement had vanished.

> I desire [said the general] that nothing of heat or earnestness may carry us here, nor nothing of affirmation, nor nothing of that kind may lead us, but that which is truly reason, and that which hath life and argument in it. Shall we quarrel with every dog in the street that barks at us, and suffer the kingdom to be lost with such a fantastical thing?

In this debate the broad, tolerant and eminently practical spirit of the great leader appears as conspicuously as in those later utterances which Carlyle has made so familiar to the world.

The debate at Putney turned chiefly upon questions of theoretical politics. The army had already occupied London and had forced Parliament to bend to its will. Ireton's Heads of Proposals had been submitted to the King as a basis of settlement. While professing himself well satisfied with most that this document contained, Charles sought to use it and its authors as a means of obtaining still better terms from Parliament. The Levellers within the army and without now began to demand that negotiation with the King should cease, but Cromwell and Ireton were not willing to agree to this. Thereupon the charge of deceit and hypocrisy was renewed against Cromwell and urged with greater violence than ever before. A new set of Agitators was chosen in the camp. The *Case of the Army truly stated* was issued as the manifesto of the extremists, and the Agreement of the People as their scheme of constitutional reform. The merits of this scheme were the subject under discussion at Putney. Cromwell presided. Ireton was the mouthpiece of the believers in constitutional reform, Rainsborough and Wildman of those who would establish a system of ideal justice by revolutionary methods. Cromwell called attention at the outset to the danger of

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adopting ideal schemes, because an indefinite number of such, with conflicting provisions, might be proposed. After much interesting debate, the first article of the Agreement of the People, that concerning suffrage, was taken up. Immediately issue was joined upon the question whether or not, under the reformed system of government, manhood suffrage should exist. Wildman had already proclaimed in the Council the doctrine of natural right, and Ireton had strongly protested against it. In true English fashion Ireton saw civil rights reflected most clearly in the institution of property, and that he based on contract. Those only should vote, said he, who had a permanent interest in the country, as evidenced by the possession of an estate. Manhood suffrage would be destructive of property. But in the mouth of Rainsborough the doctrine of natural right assumed a form very characteristic of the man and the time. He called it the "birthright" of all Englishmen. This was a vague generalization from Anglo-Saxon life — a condition of supposed freedom and equality prior to the enslavement of England by the Normans, and hence limiting statute law. The "birthright" was supposed to include among other things the right to vote at elections, and those who possessed it put themselves under government by their individual consent. It was to restore the primitive equality in property and suffrage, that the army had fought during the recent war. Ireton replied that the object striven for in the war had been to rescue the country from subjection to the will of a single man and to secure a hearing through a representative-body-for-all-property-holders-and-remotely-for-all others. He utterly refused to base suffrage on the idea of birthright.

The debate then passed to the question of royalty and nobility. The Levellers desired the abolition of both. In the Agreement of the People, as Wildman explained, an effort had been made to secure certain rights against the arbitrariness of both king and Parliament. In fact, within that idea lay the germ of the modern written constitution. Ireton, in reply, claimed that his Heads of Proposals secured the same result, and foreshadowed in his speech the present condition of the English crown, with its latent veto power. He argued that the king was bound by his coronation oath not to dissent from laws which the representatives of the nation had passed. Upon this subject the debate continued at great length. The Levellers were hopelessly in the minority and, though no formal decision was reached, Ireton's ideas prevailed. This discussion furnishes an added proof of the essentially modern character of the Puritan Revolution. We stand here near the source of those currents of political opinion which were to agitate England during the Commonwealth, and largely to determine the course of her later constitutional development.

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Spanish Institutions of the Southwest. By FRANK W. BLACKMAR, PH.D., Professor of History and Sociology in the Kansas State University. Baltimore, The Johns Hopkins Press, 1891. — 8vo, xxvi, 353 pp.

This is the tenth extra volume in that valuable series of monographs, the Johns Hopkins University Studies in Historical and Political Science. Dr. Blackmar had previously tried his hand on the same subject in the same series (*Spanish Colonization in the Southwest*, J. H. U. Studies, April, 1890), but his present volume has a much wider scope than his preliminary essay and is much more detailed in treatment. It is curious that he seems nowhere to refer to his first study.

The final bulky volume that lies before us represents a large amount of conscientious and on the whole valuable work. The general reader who has no desire to attack Mr. Bancroft's formidable volumes and the student who desires a handy work of reference will alike thank Dr. Blackmar for compiling his book. It would seem, however, that Dr. Blackmar has been too frequently forced to rely upon secondary sources of information, and that therefore his work runs some risk of being superseded. Indeed, one is induced to hope that Dr. Blackmar will some day cut the ground from under his own feet by a new treatise, for he has many of the requisites of a good institutional historian. He is laborious and not at all inclined to despise minute details; he is eminently fair and conservative in his judgments; and finally he can resist successfully all temptation to become fanciful and rhetorical. If the present volume shows in places a tendency to repetition and a want of skill in the arrangement of materials, and if the author's style is occasionally bald through the absence of connectives, these are faults which practice will soon overcome.

The book is divided into sixteen chapters, the first four of which are introductory. The discussion of the Roman origin of Spanish institutions is good, but it needs some condensation of treatment, as the subject is taken up subsequently more than once. Chapters III and IV, which describe the condition of Spain during the conquest of America and the Spanish system of colonization, show considerable study and an admirable desire to be fair to Spain. Only a captious reader who remembers Buckle's slashing chapter on the history of the Spanish intellect could be at all disposed to regret that Dr. Blackmar chooses to preserve the serene impartiality of history.

Chapters V to IX constitute the most valuable portion of the book. They are devoted to a description of the settlement of California and of the institutions founded by the priestly and military conquerors, and

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they represent not only careful study, but also the experience gained by the author during his residence within the state. The account given of the labors of Junipero Serra and the detailed description of the mission system are full of interest. Chapter X endeavors to describe the Spanish occupation of Arizona, New Mexico and Texas; but the subject is too large for one chapter, and the author has laid himself open to criticism for mistakes in his treatment of details. Chapters XI to XVI form perhaps the most interesting part of the book for the general reader. They are concerned with the social condition of the Indians, the social and political life of the colonists, political and judicial powers, trade and commerce, the land question and diplomatic relations. They present in a compact form information which is worth having and which has been gathered at much pains from many sources.

It remains only to add that the book has been well printed and that it is furnished with a number of excellent illustrations, a map and an index. Only a few typographical errors have been discovered, and they are of slight consequence. The author is therefore to be congratulated upon the fact that his work has received a setting proportionate to its value.

W. P. TRENT.

The Supreme Court of the United States: Its History, by HAMPTON L. CARSON, of the Philadelphia Bar; and its Centennial Celebration, February 4, 1890, prepared under the direction of the Judiciary Centennial Committee. Philadelphia, John Y. Huber Company, 1891. — xvi, 745 pp.

For the purpose of review this book must be distinguished into four parts. The first part is a history of the origin of the Supreme Court and of the sources of its jurisdiction; the second contains the biographies of the justices; the third is a collection of the *causes célèbres* adjudged by the court; and the fourth is an account of the centennial celebration of the origin of the court. The second and third parts, as I have distinguished them, are not separated in the book. The second and fourth parts contain no proper subjects for review in this place, although there is much matter pertaining to political and legal history in the biographies of the justices and in the addresses of the centennial orators, especially in the address of the Hon. Henry Hitchcock.

In the treatment of the first part the author has shown considerable power as an historian. He has gone to original sources and has selected the important constitutional facts in the genesis and development of the court. His arrangement of material upon certain points is a little con-

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fusing, and he is sometimes wanting in historical imagination; but upon the whole one can obtain a full and quite satisfactory view of the subject from the first one hundred and thirty-seven pages of the book.

The collection of the important cases decided by the court has been very creditably done. As a rule, the author has digested the cases with much ability and with clear appreciation of what is important in them to the construction of our judicial history.

I cordially recommend the book to all students of legal history, public law and jurisprudence.

JOHN W. BURGESS.

The Commerce of Nations. By C. F. BASTABLE, LL.D. London, Methuen & Co., 1892. — 8vo, viii, 216 pp.

This very valuable little book comes to the public as one of the series entitled "Social Questions of To-day," issued by the publishers under the editorship of H. de B. Gibbins. Professor Bastable treats some old and vexed questions in a broad and comprehensive way. He believes "that existing commercial policy and the doctrines respecting it are best explained by reference to history," and acting upon this principle he devotes the larger portion of his little book to tracing briefly but not superficially the history of international trade. Having made a specialty of this branch of economics, he is eminently fitted for the task and has accomplished it in a manner not often equalled for conciseness and clearness.

His estimate of the mercantile system and its transition into modern protectionism is especially good, and his statement of the relation between the two is thoroughly scientific. The protection theory

> retains the mercantile doctrine that the two parties to an exchange do not gain, or, in more extreme form, "that the gain of one is the loss of another." The consonance of such a belief with the sentiments engendered by war is apparent, and in practice the advocates of protection regard commerce rather as a field of conflict than as a process of peaceful co-operation.

Attributing the origin of the protective system to "the political and economic situation of the world at the commencement of the present century," he traces the ebb and flow of the doctrine down to the present time, as illustrated in the tariffs of England, the continent and the United States. Following the history is a clear and impartial statement of the arguments for protection — economic, political and social — each in turn refuted by the author in his cool, scientific style. Taken as a whole, the book is a fair and unbiassed presentation of a knotty subject by a thoroughly competent mind.

FRANK R. HATHAWAY.

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The Farmer's Side: His Troubles and their Remedy. By W. A. PEFFER. New York, D. Appleton & Co., 1891. — iv, 275 pp.

Senator Peffer advances in behalf of the farmer but little argument that is new. He has rather formulated, and perhaps elaborated, the recent discussions and platforms of the Farmers' Alliance. The statistical methods employed are questionable in the extreme. It is undoubtedly true that progress must be viewed from the standpoint of comparison, but in order to arrive at valid conclusions, sufficient data must first be secured. Senator Peffer finds that the total estimated wealth of the United States increased 511 per cent from 1850 to 1880; that, on the other hand, the development of railways during the period 1850–1888 was indicated by 1580 per cent, of banking by 918 per cent, of manufactures by 825 per cent, while agriculture advanced only 200 per cent. And from this he concludes that agriculture has been deprived of its share of the country's progress. While the inference may possibly be true, yet it is not at all warranted by the figures quoted. What the numbers really represent is not visible on their face, and the fact seems to have been overlooked that, if we begin with approximately nothing, the percentages may be increased indefinitely. On page 43, the oft-refuted physiocratic doctrine of the superior productivity of agricultural labor appears once more, although in a slightly modified form. The non-producers are estimated "at one-half the number of persons capable of labor"; and these, the author thinks, "may be doing a good business, while producers are left without gains."

Having demonstrated to his own satisfaction the unprofitableness of farming and the solidarity of the farmer and the wage-earner, Senator Peffer maintains that the present unhappy predicament of the agriculturist is due almost solely to unfavorable legislation. The somewhat startling figures purporting to show the extent and rapidity of the contraction of the currency in the United States since the war may be explained by this, that by adding in (pages 106–107) not only all the interest-bearing treasury notes, but also the temporary loan of 1864 and the outstanding certificates of indebtedness, the sum of $2,122,437,831.12 is obtained as "the amount of paper money in circulation" July 1, 1866.

The remedy proposed by the author is simply a huge increase of the currency. This is to be forced into circulation by (1) short-time loans upon personal security at one-fourth of one per cent per month, (2) loans upon non-perishable farm products deposited in national subtreasuries, and (3) long-time loans upon real estate security at one per cent interest, principal and interest payable ten per cent annually. The line of reasoning to support this project starts from the dogmatically stated doctrine that the owners of money ought not to be allowed to

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reap a greater profit than that secured by the farmer upon his labor — *i.e.* a rate corresponding to the ratio of annual savings to income. Constitutional objections are easily overcome. "Money is a necessary instrument of commerce"; Congress has power to regulate instruments of commerce; hence the power to erect the machinery required for administering the loan system. Furthermore Congress has power "to coin money and regulate the value thereof," in which is involved the power to fix the rate of interest. It is hard to believe that this latter misinterpretation of the word "value" has been unintentional. As to the derangement of prices that would follow the proposed inflation, the author opines that "if the farmers . . . could get along while prices were falling, other classes can manage to get along while prices are rising."

The arrangement of the material is very poorly balanced; the typography is fair, but the book lacks an index.

VICTOR ROSEWATER.

La Colonisation de l'Indo-Chine. L'Expérience Anglaise. Par J. CHAILLEY-BERT. Paris, Armand Colin et Cie, 1892. — 12mo, xvi, 398 pp., with two maps.

M. Joseph Chailley-Bert has given us a very interesting and at the same time an important book. The object he had in writing it is well set forth in the introductory letter to M. Léon Say. M. Chailley-Bert has recognized that there is no branch of study in which the comparative method can produce better fruit than the history of the planting and development of colonies, and as he believes that his compatriots have much to learn before the colonial empire which they are building up can be assured of permanent greatness and success, he has set himself the task of drawing from the history of the English administration of Hong-Kong and the two Burmahs lessons that may serve France, not only in regard to her own neighboring colonies of Tonquin and Anam, but also in regard to her whole future colonial policy. To appreciate thoroughly the spirit in which he has undertaken his task and the success he has achieved, it would be necessary to read his book — a necessity which few will regret who find any enjoyment in that charm of style and that perfect tact in the arrangement and presentation of matter which may be said to be the heritage of the cultivated Frenchman.

The book is divided into two parts: "The English at Hong-Kong" and "The English in Burmah," occupying respectively 138 and 243 pages. Lively descriptions are given of the natural features of the colonies and of the life led by the inhabitants. Brief sketches are also given of the history of the occupation by the British and of the subse-

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quent development of each colony. Then the question of administration is taken up and discussed in detail, the lessons that are to be drawn from English foresight or English stupidity being insisted upon at every point. It is difficult to say which is most to be admired, the author's extensive command of facts and his power of grouping them, or the wide-reaching, subtle and always sane character of his generalizations. Suffice it to say that there is hardly a dull page in his book, certainly not one that does not show wide reading and strenuous thinking. There are not a few pages also that show a striking familiarity with men and affairs — a familiarity which often expresses itself in a flash of genial humor.

In a short notice like the present it will be impossible to make quotations or even to enumerate briefly what appear to the author to be the chief causes of English success in colonization. It would take several pages to give a fair idea, for example, of the neat way in which he shows how the success of Hong-Kong has confounded the predictions of its friends and its enemies of 1842. It would take as much space to do justice to his admirable description of the effects of the English passion for an impartial administration of the law upon the Chinese population of the island. His discussion of this point seems to the present writer to bear with great force both upon the Chinese question in the West and upon the negro question in the South, especially upon the latter. The numerical preponderance of the Chinese over Europeans in Hong-Kong is much greater than that of negroes over whites in any of our Southern states, and there seems to be little reason why measures which have had a marked success in the East should fail to be effective when applied in our own land. It would not be without utility to us Americans if some one should undertake to translate at least those portions of this book which bear upon the subject indicated above.

I have said that M. Chailley-Bert's reading has been wide; it has also been recent. He quotes both from a San Francisco newspaper and from magazines not six months old. It would have been better, perhaps, had he indicated more frequently the sources of his information, but he may have been deterred by the fact that his book is the reproduction in whole or in part of articles previously contributed to the *Revue des Deux Mondes*. He is as a rule scrupulously correct in printing English names, but in one place Sir George Bowen appears as Sir J. Bowen. This statesman's services in remodelling the legislative council of Hong-Kong also receive a treatment somewhat similar to that given to his name. But on the whole M. Chailley-Bert's volume appears to deserve nothing but praise.

W. P. TRENT.

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Two Thousand Years of Gild Life . . . together with a full account of the Gilds and Trading Companies of Kingston-upon-Hull. By the Rev. J. Malet Lambert, M.A., LL.D. Hull: Brown & Sons, 1891.—414 pp.

Here is a substantial volume, with a pretty design upon its covers—representing what I imagine is intended to be Elizabethan merchant shipping—and containing some charming illustrations, issued and apparently printed by a firm of publishers at Hull. In these days when London seems to be swallowing up so much of the life of the old local centres, it is a pleasure to come across such a satisfactory piece of "provincial" bookmaking. Still more refreshing is it to find that its contents are the work of one who is not only a local antiquary, but who has also an adequate knowledge of the general literature of his subject. We may perhaps think that the chapters on the Roman *collegia* and the earlier English gilds are hardly as valuable as those in which the author introduces us to the rich material which Hull itself affords for the fifteenth and subsequent centuries. But Dr. Lambert thinks that there was a continuity of life between the mediæval gilds and the Roman *collegia;* and apparently one of the main objects of the book is to urge this view. It is true that hitherto no links of connection have been discovered; and in the opinion of the present writer the hypothesis is negatived by the whole character of the economic development of the middle ages. Still, the analogies are very striking; and we have hitherto been so rigidly held down to a view which minimized the influence of Roman life on the mediæval world, that it is probably worth while to point out the *prima facie* grounds for the opposite opinion, even in so extreme a case as this.

Looking at the book, however, from the point of view not of the general public, but of one who wishes to see what contribution it makes to our knowledge of the subject, the importance of the work lies in its publication of hitherto inaccessible documents bearing on the commercial and industrial history of Hull in the fifteenth, sixteenth and seventeenth centuries. Let me mention a few only of the points at which these documents cast fresh light on questions still under discussion. The relation between the Merchants' Companies, which are a prominent feature in the history of so many towns in the fifteenth and sixteenth centuries, and the great society of Merchant Adventurers is still very obscure. We gather from Dr. Lambert's volume that it was closer than has hitherto been supposed. For instance, the three persons among whom was to be chosen the governor of the Merchants' Company of York had to be free of the Merchant Adventurers of London (page 168). The arms, again, of the Hull Merchants' Company were the same as those of the

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great London association (page 398). A question of more general interest is that of the influence, if any, of the Reformation upon the mediæval craft societies. Many writers are of opinion that certain legislation of Edward VI put an end to the mediæval societies — that the later "companies" were new creations. But in Hull the organizations of the crafts of weavers and glovers, if no others, had an absolutely unbroken existence from the fifteenth to the seventeenth century; this is very clearly marked in the case of the weavers, whose ordinances of 1564 begin with reciting those of 1490 (page 207). Then, again, the position which the journeymen occupied in the companies is one on which additional information is welcome: and we find here that in Hull as early as 1490 the journeymen weavers were excluded from taking any part in the election of the officers of the company (page 205); while the almost contemporary ordinances of the glovers (1499) expressly limit the right of voting to the "maisters" (page 216).

But space will not permit us to go on giving illustrations of the suggestive information which will be found in Dr. Lambert's pages; enough has been said to show that it is a volume that cannot safely be neglected by economic historians. Dr. Lambert very truly remarks that

> the actual history of trade and industry in the period from the fifteenth to the eighteenth centuries is not only of more importance to us [than the earlier] as being the immediate progenitor of the present, but [that it] is also apparently almost as "dark" in current economic history as mediæval times [page 8].

W. J. ASHLEY.

Who Pays your Taxes? A Consideration of the Question of Taxation. By DAVID A. WELLS, GEORGE H. ADAMS, THOMAS G. SHEARMAN, JULIEN T. DAVIES, JOSEPH DANA MILLER, BOLTON HALL and others. Edited by BOLTON HALL and issued by authority of the New York Tax Reform Association. New York, Putnams, 1892. — 8vo, 239 pp.

This is a most disappointing and at the same time a most encouraging book. To take its good sides first, not only is it an indication of the growth of interest in questions of fiscal reform, but it will in itself serve to further this interest. It is written in a popular style; it explains once again — and this cannot be done too often — the defects in our general property tax; it contains a history of the successful attempt made in New York by the Tax Reform Association to stifle the Listing Bill which has periodically appeared; and it gives a large number of facts whose perusal cannot fail to cause the average layman to pause and think. All this is very encouraging for those who hope for practical reform.

On the other hand, the work is disappointing. In the first place, the title is misleading. The question "Who pays your taxes?" would reason-

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ably lead one to expect a consideration of the question of incidence of taxation. But in fact there is exceedingly little discussion of shifting, and that little is very superficial. Secondly, the work is mainly a compilation of old material — Mr. Wells's report of 1871, Mr. Andrews's letters of 1877, Judge Arnoux's argument of 1884, some old lectures of Messrs. Davies and Shearman and an article of Mr. Miller from *Belford's Magazine*. The only new material are the chapters of Mr. Bolton Hall, and even one of these is a reprint from *Public Opinion*. A few words as to them.

Mr. Hall rightly states that "the first step toward correct tax legislation is the study of the principles on which it depends," and emphasizes the necessity of science. Now while it may be cordially acknowledged that Mr. Bolton Hall, who is virtually the New York Tax Reform Association, has been doing and is doing a most excellent practical work, it is not probable that he would be accused by the laymen of being a "theorist" or "scientist." There is no evidence in all his pages of any acquaintance with the immense literature on the science of taxation except (apart from Mill) a few quotations from Fawcett and McCulloch, whose conclusions, as every scientist knows, no longer command assent. Mr. Hall, moreover, is not very acute. He opposes the protection theory of taxation, quoting Mill as authority, but almost immediately afterwards he upholds the benefits theory, forgetting that the one is simply a branch of the other and that Mill's argument is directed equally against each. He opposes the ability theory for the rather novel reason that a large tax would then be a discouragement of large abilities, whether mental, physical or financial. Mr. Hall devotes just two and a half pages to the whole discussion of principles, which he tells us is so important. He accepts Henry George's canons; and like an enthusiastic single-taxer, he finds our system of taxation the main cause of pauperism, of overcrowding of cities, of low wages and of general misery. And thus he is led, notwithstanding the fact that he calls the single tax "for the present impracticable," to oppose all other taxes but those on real estate (avoiding the question whether this includes improvements or not) and franchises of corporations. When will our tax reformers learn that it is utterly Utopian to expect the abolition of the tax on personal property, unless we put some other tax in its stead? And by that other tax I do not necessarily mean (as might be inferred from the statement on page 171) a direct income tax.

Those who expect, then, to find a comprehensive or scientific treatment of the system of taxation will be disappointed; but those who feel that the defects of our present system should be more fully appreciated, will be encouraged by the appearance of this compilation.

E. R. A. S.

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Die Allgemeinen Philosophischen Grundlagen der von François Quesnay und Adam Smith begründeten Politischen Oekonomie. Von Dr. WILHELM HASBACH. Schmoller's Staats-und Socialwissenschaftliche Forschungen, X, 3. Leipsic, Duncker und Humblot, 1890. — 8vo, 177 pp.

Untersuchungen über Adam Smith und die Entwicklung der Politischen Oekonomie. Von Dr. WILHELM HASBACH. Leipsic, Duncker und Humblot, 1891. — 8vo, 441 pp.

The time is long past when the history of political economy was made to begin with Adam Smith. Philosophers, historians, economists have all contributed to prove not only that each historical epoch has had its own economic ideas, but that the modern science of economics has had its prototypes and forerunners. Yet Adam Smith was so unmistakably the prophet and the exponent of the industrial revolution, that his political economy served as a fresh starting-point for modern investigation. Hence the mass of literature attempting to explain how and why the *Wealth of Nations* should have had such immediate and lasting influence.

The most recent and at the same time the most comprehensive attempt has been made by Professor Hasbach in two stout volumes. The author does not try to give a picture of the economic and social conditions of the time in their influence on Smith's work, but limits himself entirely to a discussion of the philosophic foundation. In the first and shorter work, *The General Philosophic Basis of the Political Economy founded by François Quesnay and Adam Smith*, Professor Hasbach gives a very full account of what is, after all, already moderately well known. In fact the fundamental ideas of Hasbach's work may be found in broad outline in the well-known essay of Cliffe-Leslie on the same subject. But Hasbach, of course, goes into the subject far more fully. He begins with the system of natural law, giving a short summary of the Stoic and Epicurean ideas and their reception into Roman legal and philosophical literature, — a point fully worked out years ago by Sir Henry Maine. We then get a picture of the development of natural law as an independent discipline at the close of the middle ages, — with Grotius, Hobbes and Pufendorf; the growth of individualism with Locke and Shaftesbury; the influence of Mandeville on Adam Smith, of Hutcheson and Helvetius on Quesnay. The physiocrats were influenced more by the natural science and the natural law of their times; Adam Smith was influenced rather by the moral philosophy and psychology of his country. Smith is the greater philosopher; Quesnay the greater economist. And from this survey of the philosophic precursors, we find that the new political economy is marked by the five characteristic

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principles: individualism, optimism, cosmopolitanism, economic liberty and fanaticism — all of which show that it was unhistorical. In the nineteenth century, the optimism of Shaftesbury has been replaced by the pessimism of Schopenhauer; the optimism of the physiocrats by the optimism of the socialists; teleological fanaticism by Darwinism. But the political economy of Adam Smith is as much the child of the philosophic currents of its day, as our political economy again is dependent on the modern philosophic movement.

In the companion volume, *Investigations on Adam Smith and the Development of Political Economy*, Professor Hasbach takes up some points already discussed and works them out more in detail. But he also discusses some new points. The full description and criticism of the *Theory of Moral Sentiments* may be passed over as belonging rather to ethics than to economics, although it is worthy of notice that Hasbach here again refutes Buckle's assertion that the two great works are based on the opposite principles of sympathy and selfishness. What interests us more is the attempt to trace the fundamental economic principles of Smith back to his predecessors. The history of some of his special doctrines has already been written by various authors, notably Leser, Skarczynski and Zuckerkandl. But Hasbach devotes himself not so much to the special doctrines as to the general principles. A good summary of the distinctively economic ideas of Grotius, Pufendorf, Wolff and Hutcheson show a substantial identity of general principles with those of Adam Smith: the organic conception of state and economy in the physiocrats and the systematic expositions of Quesnay and Turgot gave him some of the most important cues. More especially the trend to economic *laissez faire* is traced, not only in the philosophers, but in the economists of England, Holland and France. One of the most valuable chapters in the book is the history of the science of finance before Adam Smith and the proof that the credit of much of what is commonly ascribed to him really belongs to his English predecessors. Finally, two chapters are devoted to Adam Smith's relation to history and his method; but here the author produces nothing new.

On the whole, Professor Hasbach is full of enthusiasm for Adam Smith, but thinks that his strong points are rather in form and arrangement than in matter. Stuart is to Hasbach a far greater economist — an opinion in which, it may be confidently affirmed, the author will stand alone. For even though Adam Smith is not always entirely consistent, his clearness and precision of thought are extraordinary as compared with the confused and diffuse chapters of Stuart. Professor Hasbach tries hard to avoid the reckless underestimation of Smith which so many of the Germans have permitted themselves, if only to raise

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Smith's German contemporaries, like Justi and Sonnenfels, to a higher plane. But he is not always successful, and forgets that originality consists as often in combining well-known facts and ideas and centring them about some great principle, as in developing absolutely new ideas.

Taken together, however, these two volumes of Professor Hasbach give us what is, on the whole, the most satisfactory account of the relation of Adam Smith to his predecessors in England and France, and of the deeper currents of thought which pulsated through the philosophic and economic system of the eighteenth century. It shows once again how impossible is the complete separation of economics from the other moral sciences.

EDWIN R. A. SELIGMAN.

Litteraturnachweis über Geld- und Münzwesen, insbesondere über den Währungsstreit, 1871–1891. Von Dr. ADOLF SOETBEER. Berlin, Puttkammer und Mühlbrecht, 1892.— 322 pp.

Professor Soetbeer's volume is like his many previous contributions to the literature of bimetallism. It presents not conclusions but materials. These it presents carefully and thoroughly, with scholarly order and exactness. Professor Soetbeer's writings are the fruit of long years of study in the voluminous literature on monetary questions; and the self-restraint with which he puts before others the materials for reaching a conclusion, without encumbering these materials with opinions of his own, is unique.

The present volume purports to be a guide to the literature of money in modern times. It is this, but it is more: it presents summaries of legislation on coinage and the essential statistics regarding the precious metals, which doubtless will be referred to quite as much as the bibliographical matter which makes up the bulk of the book. It is divided into five parts, covering respectively the periods 1493–1620, 1621–1810, 1811–1850, 1851–1870, 1871–1891. Each part begins with a summary statement of the production of gold and silver, which is in the main condensed from the author's *Materialien*, published in 1885. Then follows a list of the edicts, statutes and treaties relating to coinage, with a sketch of the general course of monetary legislation in the important countries. The part then ends with the bibliography — a list of writings on monetary subjects, arranged by date of publication, those of each year being set down alphabetically by authors.

The fifth and last part, covering the period from 1871 to 1891, is naturally by far the most detailed. It occupies nearly two-thirds of the volume; and the introductory summaries of statistics and sketches of legislation run through sixty pages. To those who wish to refer to a compact and authoritative presentation of the important facts,

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these introductory statements will be invaluable. The bibliography, I suspect, will prove in practice less useful. There is no index by author's names; and unless the date of publication is known, it is not easy to find any desired title. This is more particularly the case with publications of recent date; for the list for any one year since 1875 occupies six or seven pages. It is curious to see how the literature of the subject swells after the break in the price of silver in 1876. For the period just preceding that date a page or two suffices for the publications of the year; thereafter the flood begins. Some enumerations in these later years might perhaps have been spared without loss. The debate on the fundamental principles of value carried on by Boehm-Bawerk, Dietzel and others in the *Jahrbücher für Nationaloekonomie*, seems to bear but remotely on monetary questions.

There is no room for criticism on a publication of this sort, coming from so competent a hand. Economists can only be thankful to Professor Soetbeer for the aids which his untiring industry furnishes them.

F. W. TAUSSIG.

Le Capital, la Spéculation et la Finance au XIX^me^ Siècle. Par CLAUDIO JANNET, Professeur d'Économie Politique à l'Institut Catholique de Paris. Paris, E. Plon, Nourrit et C^ie^, 1892. — 8vo, 607 pp.

This new volume by Professor Jannet is sure to receive a welcome both cordial and grateful. No subject in economics is more difficult than the main theme with which he here deals. From the early village market, where neither money nor exchanges played any considerable part, to the modern world market, the difference as regards speculation is extreme. As the areas of exchange have widened the chances for speculation have increased, until at last individual, corporation and trust are alike subject to perturbations that can be neither foreseen nor controlled. The transfer of innumerable products to such great distances, both in time and space, gives an almost limitless opportunity for the risk-taking instinct to disport itself. No passion except the sexual is so powerful and permanent as this love of risk-taking. In trade and commerce this passion involves rewards of immeasurable possibility, and hence arise the results, both good and evil, of speculation.

In Professor Jannet's volume we have a large and generous dealing with the subject. His careful use of the word "speculation" helps us to keep in mind the real nature of the function it represents. The speculator in his legitimate rôle so watches the processes of the market as to turn his knowledge to the general advantage. He *foresees* in such way as to regulate supply and demand at necessary points. In his

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proper part, he is a regulator of the market at precisely the most dangerous crises, holding it nearer to a safe equilibrium.

Though this is the common optimistic view of the more sober economists, it serves our author admirably in his analysis and criticisms of the evils that accompany speculation. He does not tell us any new evils, but with great skill shows the relation of those that are well known to the causes of the trouble. His remedies, too, have a wholly enlightened relation to the ills they would lessen. So much that is written against speculation we find the dreariest of reading, simply because the one central fact which most concerns the theme is ignored — the fact, namely, that nothing is more deeply rooted in general human nature than the instinct to speculate, *i.e.* to take risks for the sake of some form of gain. We shall sometime learn that this instinct, to the extent that it proves socially serviceable, is not only a market regulator, as economists have taught, but one of the most fruitful of all human forces. We owe to it innumerable inventions, as well as a long list of those enterprises upon which progress most depends. It is certain that all legislation which does not recognize this capital fact — not as true of a few men called speculators only, but of human nature at large — must, after doing a good deal of harm, fail. For more than a century and a half the French tried by laws to stop "*opérations à terme*," but in 1885 they were forced to give it up. Prussia repealed her legislation in 1860, after she had tried by three laws to reach the same end. It is Professor Jannet's distinction to keep these facts of history and the real nature of speculation clearly in mind. Upon this background both the evils that he admits and the remedies he proposes stand out in clear light.

That shrewd men in such conditions, and with such a human nature, can combine to take advantage in countless trickish ways, is evident. Cornerings, forcing up or down of market values, spreading false reports, *etc.*, are evils widely recognized, but evils that should be kept distinct from the great and proper functions of speculation. Utterly to abolish these evils would be as impossible as to make the press perfectly clean and truthful. The author would give the law real scope, especially by demanding far stricter accountability as to measures and to means from all beginners in new and speculative enterprises. It is chiefly through this enforced accountability and publicity that the law must act. To the lack of this the author traces the actual ruin of so many enterprises in France.

Admitting thus a considerable sphere for the law's positive action, M. Jannet finds the chief remedies in that large variety of social and business institutions through which the people are educated into sanity and sense. He is at one with Professor Gide in his hope of co-operation. Though he holds that the wage function is permanent, he gives

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an inspiring list of such institutions as the 604 *banche populari* in Italy, the 2000 *vorschussvereine* and 1700 Raiffeisen banks in Germany, and the *crédit industriel et commercial* in France — indeed, all such forms of "mutualism" in business as increase the economic independence and at the same time the business intelligence of the people. In the wider spread of all such counteracting and socially strengthening influences, the author sees the surest hope of so supplementing the action of the laws as to check the evil as far as its nature admits.

There is doubtless room for some criticism upon a distinction which the author makes between the economic and the moral order. The present economic order is vigorously defended, while the evils of the industrial system are too sharply included in the "moral order" and in the present political régime, which is not a government of the people but of a party merely. In *Les Devoirs des Classes Aisées dans la Démocratie*, Professor Jannet has very eloquently admitted that democratic government has at last come to stay. Imperfectly as the government may represent civil equality, the economic order must inevitably come more and more under control of those in city and state to whom the people intrust the government. The practical value of the distinction seems therefore very slight. The evils of speculation, if dealt with at all, must be reached *both* through legal mechanism in the hands of government and through a wide diversity of "self-help" institutions. Actual distinctions, therefore, between moral and economic order would seem of little real value for questions so practical as speculation. It is precisely "le triomphe de la démocratie" in France which makes so many industrial difficulties, but it is a fact of rather sinister character that the *demos* is securing political control faster than it is learning the true relation between legislation and business affairs. The difficulties of the bourse speculation, money and taxation are serious because the *demos* is getting control of legislation so much more rapidly than it is learning finance. This is the "tangled matter" which makes the problem. In it both morals and economics are mingled. If their separation has little practical value, the essential remedies which the book offers have all the greater value. It is altogether a problem of political and business training, and those institutions are to be most welcomed which act most widely and most powerfully upon the great body of electors into whose hands the governing function has at last fallen. In his final chapter the author enumerates the "sources of hope," some of which have been here indicated. For a better meeting of the difficulties one could not wish for a more strengthening or wholesome influence than the widest possible reading of this most admirable study.

JOHN GRAHAM BROOKS.

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The Theory of Dynamic Economics. By SIMON N. PATTEN, PH.D. Publications of the University of Pennsylvania, 1892. — 153 pp.

The new idea in Professor Patten's book may be described as follows: As an individual diversifies his consumption, he gets higher marginal increments of pleasure from the same amount of income. Why cannot we apply the same sort of reasoning to a nation? Will not a nation with an intelligent and diversified consumption enjoy a higher marginal utility and therefore, in a most important sense, a higher general value in its products, than one whose consumption is less intelligent and diversified? Is not this increase of marginal utility the very essence of human progress?

The idea is an interesting one, and may prove sound and fruitful; but the proof given in the book does not seem to me satisfactory. On the contrary, the analysis is open to criticism of so fundamental a character as to throw grave doubt on the author's conclusions. The elements which give such cogency to the reasoning of Jevons or Walras are conspicuously wanting here. All through Jevons's beautiful analysis, we see how different individuals, measuring the relative utility and sacrifice of different articles to themselves, produce changes in demand and supply which ultimately establish certain relations of value in the community. Nowhere in his whole book does Jevons fall into the error of directly measuring against one another the utilities of a thing to different individuals. Nowhere in his whole book, we might almost say, does Professor Patten keep out of this error. A large part of his reasoning is directly, though not explicitly, based on the assumption that articles which have the same value have the same marginal utility to different consumers — a palpable mistake, which entirely vitiates all proof based upon it.

No small part of this confusion arises from the author's use of the Austrian term "subjective value" instead of final or marginal utility. This leads him to suppose that his "subjective" and "objective" values are quantities of the same general sort and can be used to some extent interchangeably; whereas they are wholly different, and the attempt to combine them in the same diagram only leads to error. Let us take a single illustration. Rent is an excess of price over cost. The price of an article and the marginal cost will be on an average approximately the same. When Professor Patten speaks of an excess of value above marginal cost, he is clearly dealing with "subjective" value. But he goes on to treat rent as being a part of surplus value in this sense. If he had called this part "subjective" rent, it would have been unimportant and harmless; but he boldly identifies it with the common every-day objective rent, and paves the way for inferences which I believe to be practically wrong.

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The time is past when economists can be allowed to confuse sacrifice with expense, utility with price; when they can treat one man's utility or sacrifice as equivalent to another man's, merely because the same quantity of money or goods or hours of work is involved. It may be true that Jevons's solution of the problem of value was a purely statical one, and that there is room for a wider "dynamic" treatment of the subject. But if an author seeks to secure this wider treatment by abandoning rigidity of analysis, he makes a step backward instead of forward.

ARTHUR T. HADLEY.

The Use and Abuse of Money. By W. CUNNINGHAM, D.D. New York, Charles Scribner's Sons, 1891. — 12mo, 219 pp.

This is the opening volume of a series of some thirty, springing from experience derived in the conduct of University Extension courses and designed to provide better facilities for such work in the future. Dr. Cunningham, who was one of the pioneers in the movement sixteen years ago, has since become well known as an able and suggestive writer on English economic history. As an historian he excels in the exposition of the ideas and conditions of the past, but as a writer on general economics he seems deficient in thorough analysis.

The real subject of the present work is "Capital in its Relation to Social Progress"; but in order to "lay stress on the element of personality," the author chose the title "The Use and Abuse of Money." The choice of the latter title instead of the former gives one a clue to the character of the book and to its weak points. The first title belongs to economics, the second to ethics. Of the work itself about two-thirds are devoted to economic discussion, while the remainder is practical ethics. Dr. Cunningham's purpose in looking at the subject from these two sides is to raise the question "whether a full recognition of the human element in economics may not be the best means of attaining to clear definitions of economic terms, and to the distinct statement and thorough discussion of fundamental economic problems?" That he should have regarded the second title as preferable to the first, indicates in part that he is more interested in the ethical than in the economic side of the question, and in part that his definition of capital is too narrow.

His definition of capital is embodied in the following statements:

A man's capital, as we talk about it in the present day, is understood to be a fund of wealth from which he expects to get an income.

A man's whole capital will very rarely actually be in the form of money, but it is always potential money.

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Hence capital, as we habitually think of it, is a fund of wealth, realizable in money, and from which the owner expects to derive a money income.

From all this it follows that capital as we speak of it to-day, can only exist where money is generally known and used; . . . [consequently communities] may be very industrious, and practise all sorts of useful arts, but they have not reached the social conditions which are implied in the very nature of capital . . . if the exchange of wealth is not regularly practised.

. . . the use of a medium of exchange without which the formation of capital cannot take place at all.

This collection of sentences brings out the weak point in Dr. Cunningham's analysis of capital. He runs very near identifying money with capital and fails to distinguish between the mere existence of capital in a society and its predominance in the economic life. Capital can exist without money, but "capitalistic" production cannot. The formation of capital may precede exchange, but investment of capital will not. Dr. Cunningham is really discussing the conditions of the investment of capital rather than the conditions of its formation. This is somewhat surprising, since on page 27 he says with truth that "the functions of capital are less likely to be clearly seen when we confine our attention to special and later development."

It has become rather common to classify acquired skill as capital. Dr. Cunningham draws, it seems to me, a thoroughly sound distinction between the two. The utility may be very similar in some cases, and they may result from a similar process of "investment" or expenditure with an eye to a future return of higher value, yet one is an inseparable part of the man, while the other is his property, to be kept or parted with at pleasure. A good name is rather to be chosen than great riches and may be harder to get, but nothing is gained in such cases in economic analysis by classing things so essentially different under one head.

The author's suggestion to substitute "national resources" for the term "national capital" is a good one in any case, but is especially to be commended as an alternative to one of his definitions of "national capital," which makes it include all the "conditions of production" — soil, climate, population and capital proper!

In discussing land the use of popular language seems to confuse the analysis. When "wealth has been sunk in land, it has ceased to be that kind of wealth which is ordinarily called capital." This narrows or in part dispenses with the category of "fixed capital." It seems to me that Dr. Cunningham is constantly led astray by trying to conduct a scientific discussion in popular terms when the popular terms often represent erroneous conceptions. On page 151, however, we stumble upon a use of the word "productive" which one might hope would be obsolete by this time. It is there stated that "expenditure on educa-

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tion and art and the cultivation of taste and the improvement of human faculty is unproductive; . . . all the expenditure that is made in investigation and on moral or religious culture is unproductive." He should have at least added: "in the first instance."

For the purposes of elementary instruction it is far better to classify labor as productive and destructive, and productive labor as productive directly and indirectly, or better still, with Professor Marshall, as productive of the means of production and productive of the means of lasting enjoyment. It is rather staggering at this day to be told that the scientific investigation which directly led to that mastery of natural forces which has made the present century so far outstrip preceding ages in the production of wealth, is all unproductive.

Though this review has dealt almost exclusively with points that are open to criticism, the body of the work contains much that is an addition to our readily available literature on capital. The discussion of the relation of capital to wages and the wages-fund theory (pages 130–132) seems to me very judicious. The latter third of the volume, which discusses the morals of the use of capital, is comprehensive in its range and sound and sensible in its teachings. Probably this will prove the most directly helpful and suggestive part of the work to the majority of the readers.

EDWARD G. BOURNE.

A History of Epidemics in Britain, from A. D. 664 to the Extinction of Plague. By CHARLES CREIGHTON, M.A., M.D. Cambridge, at the University Press, 1891. — 706 pp.

This is a book which might perhaps escape the notice of the students of social and economic history, but which certainly ought to receive their attention. It is the first systematic history of epidemics in any language; in English it has no predecessor known to the general reader but the treatise of Hecker, which every one who has had occasion to consult it must have felt to be most unsubstantial. Dr. Creighton's is a work of wide learning judiciously and modestly employed; and it will probably long remain the standard authority on the subject. To the economic historian it has the peculiar value of being in large measure a view of the seamy side of his own subject, looked at from another point of view than that to which he is accustomed, and brought into connection with another set of facts. And Dr. Creighton's acquaintance with the general European literature of his subject is so complete and so skilfully utilized that the book is a contribution to the social history not of England only, but of Europe as a whole.

It would be impossible in the compass of a brief review to give an adequate account of the contents of a volume which is crammed with

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facts, or to criticise the conclusions reached by Dr. Creighton as to the pathological character of the grisly array of diseases whose ravages he traces. This last task in particular falls outside our lay sphere. But there are two matters on which the opinions of Dr. Creighton appear to be both novel and of prime importance for the social history of the middle ages; and of these it may be interesting to present a brief abstract.

It will be remembered that the late Professor Thorold Rogers was wont to lay down with much vehemence that wheat was the staple food of the masses of the English people. This has been called in question by recent writers, *e.g.* by Mr. Prothero; and there is certainly a good deal of evidence for the cultivation of barley. But so far as rye is concerned, Dr. Creighton now comes to the aid of Rogers with the argument that the disease which in France and elsewhere resulted from the consumption of that cereal scarcely appears in English annals. This disease, "ergotism," arose from the use of spoilt rye as food; and "the immunity of England" from it "with such a record of famines as the annals shew, can only have been because little rye was grown and little black bread eaten. The standard of living would appear to have been higher among the English peasantry than among the French" (page 65).

A record of diseases, with frequent descriptions of their symptoms, is not, perhaps, the pleasantest of reading; and such a list as that of "famine-pestilences," given on pages 15–17, make whatever gloomy impressions we may have had already of the life of the middle ages still gloomier. But there is one traditional feature in the picture which Dr. Creighton has done his best to wipe out, — and that with what seems good warrant. He has no patience with the historical figure of the leper.

> Our more graphic writers have put that disease into the mediæval foreground as if it had been the commonest affliction of the time. We are taught to see the figures of lepers in their grey or russet gowns, flitting everywhere through the scene; the air of those remote times is as if filled with the dull creaking of St. Lazarus' Rattle [page 86].

But according to Dr. Creighton the usual language on the subject is three parts sentimental nonsense. For, in the first place, many maladies which were not leprosy at all were confused under that general name, partly from ignorance, partly to excite sympathy, partly as an euphemism (page 72). In the second place, leprosy of all kinds was much less common than has usually been supposed. Out of the 172 establishments that have been enumerated on some authority, good or bad, as lazar houses, not more than about thirty can be proved to have been for

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the reception of lepers; nor were these exclusively or even mainly for lepers (page 96). Then, again, as early as the end of the thirteenth century leprosy was dying out (page 97); "the prevalence of the disease, such as it had ever been in England, had almost ceased and its sentimental vogue passed, in the reign of Edward III" (page 224). And, finally, not to leave the old historical figure a leg to stand upon, Dr. Creighton denies that even the true leprosy was contagious:

> The segregation of lepers . . . was far from complete, and many ministered to them without fear and without risk. The same hospital received both *leprosi* and others; the hospitals were served by staffs of chaplains, clerks and sometimes women attendants; and yet nothing is anywhere said of contagion being feared or of the disease spreading by contagion. The experience of these mediæval hospitals was doubtless the same as in the West Indies and other parts of the world in our own day. It is true that the medical writers pronounce the disease to be contagious, *ut docet Avicenna*; but the public would seem to have been unaware of that, and they certainly lost nothing by their ignorance of the medical dogma, which, in the text-books, is merely the result of a concatenation of verbalist arguments [page 101].

But before altogether yielding to these positive statements, we should like to wait for the report of the Indian Leprosy Commission which is now sitting; at present it is understood to be the opinion of most of the Indian medical authorities that leprosy is contagious, though "difficult of contagion." We should also like to learn from Dr. Creighton what is his own explanation of the case of Father Damien.

Leprosy Dr. Creighton declares to have been a *morbus miseriæ*, the result of the consumption of semi-putrid meat and fish; a conclusion probably true for mediæval Europe, although it cannot be adequate as a universal explanation of the disease, since nine out of ten among Indian lepers have never touched either fish or meat. It was "not," he adds, "on the whole a very common disease; and it was easily shaken off by the national life when the conditions changed ever so little" (page 112). The modern disease presenting the nearest affinity to it is the *pellagra* of the North Italian peasantry, which is "due to a staple diet of bread or porridge made from damaged or spoilt maize."

> This disease is not mentioned in the Bible, therefore it has no traditional vogue; it is not well suited to knight-errantry, because it is a common evil of whole provinces; its causes are economic and social, therefore there is no ready favor to be earned by systematic attempts to deal with them; and there is absolutely no opening for heroism and self-sacrifice of the more ostentatious kind [page 110].

From which it will be perceived that Dr. Creighton's pages are not unrelieved by sarcasm.

W. J. ASHLEY.

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Zur Geschichte und Organisation des Römischen Vereinswesens. Drei Untersuchungen von W. LIEBENAM, Ph.D., Privatdocent an der Universität Jena. Leipzig, B. G. Teubner, 1890. — 8vo, viii, 335 pp.

Les Manieurs d'Argent à Rome. Étude Historique. Par ANTONIN DELOUME, Professeur à la Faculté de Droit de Toulouse. Paris, E. Thorin, 1890. — 8vo, 500 pp.

The general reader who is not repelled by the formidable apparatus of notes and citations or by the lengthy discussion of philological and antiquarian *minutiæ* in Dr. Liebenam's book, will obtain from it a clear idea of the character of the Roman guilds and many interesting details of their history. The special student will value the work for the very qualities which may prove deterrent to the general reader. In the first of his three essays the author traces the general development of Roman industrial and commercial associations. In the third he examines their organization in detail. In the second essay he takes up separately each group of guilds — from the *navicularii*, who had fleets on all the waters of the empire and provided all its great cities with corn, to the gladiators, mimes and musicians who ministered to its amusement — and shows, as far as the literary and epigraphic material makes this possible, their territorial distribution.

The history of the Roman *collegia*, according to the Romans, reached far back into the royal period. Liebenam views the traditional guilds of that period with critical distrust. Some of them seem to him quite irreconcilable with what we know of the economic conditions of the time. Even in the republican period the evolution of true craft guilds must have been greatly impeded by the self-sufficiency of the landed household with its slave artisans. The earliest Roman guilds, Liebenam thinks, were made up of landless freemen; and one of their chief objects must have been the protection of free industry against slave labor. They attained little importance even when the social life became more complex, because the early establishment of commercial relations with more civilized countries and the extensive importation of foreign products checked the development of Roman industry. The merchants throve, but not the artisans. Nevertheless, the latter had their colleges throughout the republican period, and the colleges had sacrifices to their patron deities and annual banquets. They probably helped their members in distress and, if necessary, paid for their funerals. They needed, Liebenam thinks, — the point is controverted, — no authorization from the state, though they might be dissolved by the Senate on grounds of public interest; and they were ordinarily free from the supervision of the magistrates.

Towards the end of the republic these associations were largely cap-

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tured by demagogues and utilized as political clubs. It was a period of such clubs, and many new *collegia* and *sodalitates* were founded which made no pretence of pursuing other than political ends. In this, as in many other respects, the last century of the Roman republic has, to an American, a singularly modern air. It seems like a chapter of contemporary metropolitan history when we read of district associations, recruited *ex omni fæce urbis*, named after political leaders, organized in blocks of ten (*decuriatæ*), and officered by *sequestres*, who levied contributions on the candidates for office, and by *divisores*, whose name needs no interpretation. Non-voters, slaves even, were taken in; for they were useful in street-fights and election riots.

With the establishment of the empire all societies were suppressed except the old religious colleges and the true guilds. New associations, it is generally supposed, henceforth needed the express authorization of the Senate; but Liebenam maintains that a decree of the Senate was necessary only to confer corporate rights, and that in the early imperial period, at least, the people still enjoyed the right of free association. Of course the colleges could always be suppressed, as in the previous period, if they pursued ends of which the government disapproved. As regards the actual practice, Liebenam cites with approval the saying of Rodbertus, that the empire took the power of association from the upper classes and gave it freely to the lower. There were general statutes for the incorporation of the *collegia tenuiorum*.

The early empire was the period of the greatest development of the mercantile and craft guilds. Many of them discharged functions of the greatest importance to the administration, and received valuable concessions and privileges from the imperial government. But the very importance of their duties and of the privileges granted them occasioned a constant increase of governmental supervision and control; until, in the later empire, the relation of the guilds to the state ceased to be regulated by free contract and was fixed by imperial ordinance. At the same time the associations ceased to be voluntary. All persons pursuing a given calling were forced into the proper college; and the sailor was bound to his ship and the artisan to his bench, as the peasant farmer was bound to the soil and the soldier to his legion. Service of all kinds became hereditary. The member of a guild was forbidden to marry out of the guild, on penalty of deportation and confiscation of all his property. But with this final form of the Roman college our readers have been familiarized by Mr. Adams Brown's admirable account of the "State Control of Industry in the Fourth Century" (POLITICAL SCIENCE QUARTERLY, II, 494).

Dr. Liebenam's scholarly investigation supplements the classical work of Mommsen, *De Collegiis et Sodaliciis*, published in 1843. He

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has utilized, with conscientious care, the epigraphic material since discovered, and has re-examined the grounds of Mommsen's conclusions. In another way these essays supplement Cohn's *Zum Römischen Vereinsrecht.* Cohn is chiefly concerned with the law of association at Rome, while Liebenam, without ignoring the legal problems involved, is more interested in the historical and economic aspects of the subject.

It is to a large extent with associations at Rome that Professor Deloume also busies himself, but with associations of a different character. In studying the history of the Roman financiers he devotes much of his attention to the *societates publicanorum*, which, according to his theory, were stock companies. He shows that during the last two centuries of the republic a large number of financial associations were suddenly organized to contract with the state for the performance of great public undertakings. These were the societies of the publicans. They assumed tasks of every description: the construction of public buildings, military roads and aqueducts; the exploitation of state mines, quarries and salt-works; the purchase and transportation of the corn needed for distribution to the proletariat of Rome; army supplies of all kinds and the transportation of troops; and, finally, the collection of all kinds of imposts and taxes. This last was so much the most important of all their various fields of operation that publican and tax-farmer came to be regarded as almost synonymous terms. Sometimes different societies farmed the different taxes; sometimes all the revenues of a province were purchased, for a term of years, by one great society. These companies were composed, primarily, of *socii*, *i.e.* of persons who contracted directly with, and gave ample security to, the treasury; but in second instance there were numerous silent partners, *participes*, who invested definite sums in the names of the ostensible members of the company, and who had definite shares, *partes*, in the business. By a special exception to the general law of the Roman *societas* — an exception which inured to the benefit of the publicans alone — these *partes*, or shares, like the interests of the *socii* themselves, were heritable and alienable. In other words, the *societates publicanorum*, according to Deloume, were joint-stock companies with two classes of stockholders: the one class indefinitely liable, and the other liable only to lose the money actually invested or pledged. The *socii* were the real managers of the company and determined the dividends; the *participes* had claim only to the dividends declared and, in case of the dissolution of the company, to a share of the capital stock. This is essentially the French stock-company *par commandite.*

The shares in these companies naturally varied, from time to time, in

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value. Stock in the Asiatic company must ordinarily have commanded a large premium; but events like the massacre of all the Romans in Asia and the Mithridatic war must have made it temporarily valueless. According to Deloume, shares in the publicans' companies were the object of active and constant speculation on the forum. There were not only *partes*, but *particulæ*, and the latter were within the reach of all but the very poor. Whoever held a share was of course interested in the success of his company, and any legislative measure promoted by the publicans was sure of the votes of all their shareholders. Assuming, as Deloume does, that nearly every one in Rome was a shareholder, it is easy to see why the equestrian order, to which all the publicans belonged, was able to shape the legislation of the *comitia* and to make itself the chief power in the state. Its greatest triumph was gained when the *lex judiciaria* of the younger Gracchus gave it the monopoly of criminal justice. Henceforth the publicans were practically irresponsible: the plundered provincials or some watch-dog of the treasury at Rome might initiate proceedings against them, but they were sure of exculpation. At the same time the provincial governor who dared to check their manœuvres, in the interest either of the provincials or of the treasury, was liable to be crushed beneath fictitious charges. The power of gold had become so great at Rome that nothing but iron could break it; and the only way out of the plutocracy of the later republic led into the military monarchy. With the establishment of the empire, the publicans were so closely watched and controlled that their enterprises lost most of their speculative value; and before long imperial officials did the greater part of the work formerly done by private contractors. Then the joint-stock company, possible only in the case of the publicans, disappeared from the Roman law.

M. Deloume has nothing to say either of the magnitude of the financial enterprises conducted by the Roman capitalists or of their complete control of the state during the last century of the republic that any one conversant with Roman history will care to dispute. His statement that their operations were "certainement plus vastes que les plus grandes entreprises de nos jours" may be set down as a rhetorical exaggeration, but in general the picture that he draws is a faithful one. As to their power, nothing more can be said than was said by the Romans themselves; nor can anything be more conclusive on this point than the mingled admiration and apprehension with which the time-serving Cicero invariably alluded to them. But when we come to Deloume's theory of the juristic organization of the publicans' companies, we are struck with the paucity of texts upon which his argument rests and the large amount of *a priori* reasoning employed in its support. His further assumption that the shares of these companies were held by

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multitudes of "la classe moyenne" and that the capitalists controlled the popular assemblies through the votes of the small stockholders, really rests upon a single text. Polybius says that the enterprises farmed out by the censors were actually conducted by the people (διὰ τοῦ πλήθους); and that almost everybody, so to say (σχεδὸν, ὡς ἔπος εἰπεῖν, πάντας), had an interest in them. But "the people" is an elastic term; and when one speaks of "everybody" in a city, he is quite apt to refer to a class as restricted as the French describe to-day by the phrase "all Paris." If we know anything about the economic condition of the city of Rome in the last century before Christ, we know that there was no middle class; that the enormous wealth of the city was in relatively few hands, and that there was a more abrupt line of demarcation between the rich and the poor than exists to-day in any great city of the world. The moneyed class controlled the assemblies through the venal votes of the very poor.

In one respect M. Deloume's reconstruction of the *societates publicanorum* is confused and contradictory. When he shows how the senators, who were legally debarred from any overt participation in the profits of the publicans, evaded the law by becoming silent partners, and again when he argues that the *participes* were not personally responsible to the treasury, he tells us that their names did not appear, and that their connection with the enterprise was not ascertainable (pages 142, 150). But when he inquires what were the rights of the *participes* against the company, how these rights were enforced and how they were transferred, he tells us that each company kept a register of its shareholders and that the transfer of a share was made by entry in the register (pages 158, 492). We are also told, in connection with the case of Verres, that these registers were open to judicial inspection.

A peculiarity of M. Deloume's book is his uncritical use of Livy as an historical authority and of Cicero as a juristic authority. When we find him repeating Livy's fables concerning the essentially economic character of the earliest struggles between the patricians and the plebeians, and when we are told by him that Cicero's works give us "les documents *les plus exacts* sur le droit spécial à son époque," we do not need the evidence of his own references to modern literature to perceive that he reads German works only in French translations.

Both of these books are interesting studies in social history; and both bear out the statement of the French author that, whatever ground the Roman law may have lost in Europe as a purely legal discipline, it has more than made good in another direction — through the growing recognition of its importance to students of politics and economics.

MUNROE SMITH.

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Zeitschrift für Volkswirthschaft, Socialpolitik und Verwaltung. Organ der Gesellschaft Oesterreichischer Volkswirthe. Herausgegeben von EUGEN VON BÖHM-BAWERK, KARL THEODOR VON INAMA-STERNEGG, ERNST VON PLENER. Erster Band, 1 Heft. Vienna, F. Tempsky, 1892. — Royal 8vo, 200 pp.

It is not surprising that the great activity recently shown by the Austrian economists should finally have culminated in the publication of a scientific journal, which, if we are to judge from the first number, bids fair to be a formidable rival of the existing quarterlies in Germany. The character of the journal is vouched for by the names of the editors. Professor Böhm-Bawerk is known to the English-speaking public through the recent translation of his masterly works on *Capital* and *Interest;* Herr von Plener is scarcely less well known through the translation of his work on the *English Factory Laws*, in 1873; while Professor von Inama-Sternegg is known especially for his erudite *Economic History of Germany*, which has not yet appeared in English dress. Professor Böhm-Bawerk sketches the policy of the new quarterly in an introductory essay, calling attention to the importance of economic problems and showing how it is to be devoted, not merely to problems of theory, but especially to the questions of the day in Austria. This programme is well carried out in the present number. Dr. Baernreither, a translation of whose great work on *English Associations of Workingmen* has recently been published, discusses the question of social reform in Austria, showing that the problem is not very different from that in other countries. Professor Sax has a scholarly article on progressive taxation, in which he repeats the views expressed in his large work on theoretical economics of several years ago. These views are interesting but not convincing. Professor Wieser, one of the leaders of the Austrian school, writes of the factory system and co-operative societies of production; while Dr. Schwiedland, who has recently earned an enviable reputation in the discussion of industrial questions, treats of the rise of the domestic system in Austria. Finally, a full account of the proceedings of the Austrian Economic Association is given. The quarterly, thus, is meant mainly for Austrians, but it is by no means without importance for economists in general. There is obviously no effort to make a special feature of reviews; those in the present number are rather inadequate. The quarterly is gotten up in sumptuous style, with large pages, beautiful print and wide margins, so that the general appearance is far superior to anything of the kind that we are accustomed to from Germany. It will form a necessary part of every college and economic library.

E. R. A. S.

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Économie Sociale. Par LÉON SAY. Exposition Universelle de 1889, Groupe de l'Économie Sociale, Rapport Général. Paris, Guillaumin et Cie, 1891. — 438 pp.

One of the most interesting and significant features of the Paris Exposition of 1889 was that known as the Exposition of Social Economy. The extensive buildings devoted to the comparative museum of social and industrial remedies and ideals stood for a distinct recognition of the moral element in the century of material progress to which the exposition as a whole was largely dedicated. The purpose of this unique sociological museum was both popular and scientific. On the one hand, its statistical tables, charts, models, books, mural decorations, *etc.*, must be so arranged as to impress the careless, world's-fair-visiting public with the essential relation between the material, intellectual and moral advance of the worker and the general advance in science, art and industry. On the other hand, all this information must be so collected and disposed as to give the sociological student reliable scientific data for generalization. As a popular educational enterprise the verdict of success has already been given; but to the more serious student, who found the surroundings not wholly congenial to work and left the Exposition of Social Economy rather bewildered by the great mass of heterogeneous information, M. Say's *General Report* will be of the greatest service.

Obviously it would be unreasonable to expect of a single volume any detailed analysis or description of the documents and institutions represented in the sixteen sections into which the Exposition of Social Economy was divided. For such particulars the reader is referred to the special report prepared for each section by the president of the committee in charge. M. Say's report confines itself to the most important general facts, — devoting a chapter to the peculiarities of each section and the conclusions to be drawn from its special report.

It is difficult to indicate concisely the character of sections so diverse in scope as to include every organized attempt, by philanthropists, by employers or by the state, to ameliorate the condition of laborers. Roughly, however, the sixteen sections are divided into six topical groups. The first group is concerned primarily with efforts to increase the share of laborers in the gross or net product of industry. It includes, among others, the sections covering wages, profit-sharing and co-operative production, trade organizations, technical instruction and the comparison of large and small industry. The second group deals with the various institutions of *prévoyance*, such as mutual aid societies, old-age pensions, life and accident insurance and savings banks. The third group embraces the sections devoted to projects for lessening the

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cost of living, as well as the cost of production in certain industries, *e.g.* distributive co-operation. The fourth group is devoted to the possibilities of physical and moral improvement by means of better homes, better opportunities for physical and mental recreation — workingmen's dwellings, clubs, *etc.* The fifth group comprises a great variety of institutions created by employers in favor of their employees, brought together in Section XIV. Finally, the sixth group, which was added to the original fifteen as a special study of state socialism and individual initiative, is likewise represented by a single section, entitled: "*Intervention Économique des Pouvoirs Publics.*"

Naturally many valuable contributions to the literature of the exposition were so comprehensive in character as to belong about equally well in any or all the sections. To cover such cases an outside section was created for the work of some fifteen exhibitors. It is to these general treatises that M. Say devotes the first and most exhaustive chapter of his book. This chapter constitutes in fact a special report upon these fifteen exhibitors; the following chapters are more like reviews of the reports already made by presidents of the sections.

The exposition did not possess to any considerable extent that "universal" or international character which it was hoped to secure. Belgium, Italy and England were well represented, though the English trade unions were wanting, and the building societies, friendly societies and the like made an inadequate exhibit. The United States was conspicuously absent in certain sections, despite the enthusiasm evoked by the federal and state bureaus of labor statistics. Switzerland, Sweden, Russia and Brazil were barely represented, but nothing more. Most lamentable of all, however, was the persistent refusal of Germany to participate. The student of sociology will appreciate this loss when attempting to use the facts for generalization in regard to state intervention, not to mention a score of institutions upon which German experience is peculiarly rich and instructive. Only two Germans appear in the list of exhibitors.

It is not to be supposed that the discussions presented by M. Say merely served the purpose of a directory of names, institutions and publications. On the contrary, the résumés and the citations frequently give the gist of the memoirs in question, and are often very interesting, in spite of an inevitable incoherence. So, for example, the reader gets from the first chapter a bird's-eye view of the single French *départements* in their industrial aspects, or of the educational, co-operative and socialist propaganda of a country like Belgium, with a graphic sketch of national characteristics. Moreover, so far as may be, materials are furnished for rough statistical comparisons as to changes in wages and cost of living in different localities; and apart from any question of

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general conclusiveness, these estimates have a descriptive value suited to the purposes for which they were devised.

"*La paix sociale*" and moral considerations of the highest order play an important part in all these discussions. Witness the sentiments quoted from time to time with special approval: Social economy cannot rest content with "simple justice;" "User d'un homme et user d'une machine seront des choses éternellement différentes aux yeux de la morale," *etc., etc.* The tendency of the work in questions of economic theory, appears incidentally in a theoretical and statistical refutation of the wage-fund theory and the "brazen law" of Lassalle; in a demonstration of the necessary persistence of the fundamental idea of wages in systems of remuneration; and in optimistic generalizations as to the benign influence upon manual labor of the universal tendency to concentration of labor and capital. But the book is not an economic treatise in any sense which insures coherent or consistent proof of conclusions announced; neither do the limits of the volume make it reasonable to expect a complete statement of the facts upon which inductions are based. At best we must accept the results as an abridged version of many separate studies, pleasantly tinged with the compiler's personal opinion, —a sort of "review of reviews," with the characteristic virtues and some of the defects of such work.

In conclusion it may not be irrelevant to raise the general question as to how far the purposes of those in charge of this sociological exposition have been didactic rather than impartially scientific — to what extent the desire to make the exposition serve the purpose of educational propaganda has preponderated over more strictly scholarly interests. And here it should again be borne in mind that, with all its cosmopolitan ambitions, the Exposition of Social Economy was pre-eminently French, and pre-eminently addressed to the great French people by men who were statesmen as well as scholars, who brought to the theoretical study of social philosophy practical and patriotic convictions as to desirable and undesirable tendencies in the national life. Throughout M. Say's report the influence of this personal equation is not difficult to trace, whenever there is any opportunity to throw weight into the balance in favor of individual initiative and voluntary self-help.

EDWARD CUMMINGS.

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BOOK NOTES.

CESARE LOMBROSO'S studies of abnormal anthropology under modern social conditions are always full of interest and suggestion to the sociologist, the statistician, the lawyer and the legislator; but, unfortunately, they are disappointing in methods and results. Professor Lombroso is too arbitrary in his distinctions to be a sound reasoner, and in his investigations the personal equation is so large and so uncertain that his readers can feel little confidence in his statistical tables. These faults are glaring in his new work on *The Man of Genius* (Scribners), in which genius is regarded as a form of insanity. The idea is not new, and it may be that insanity is more closely related to genius than to commonplace talent; but the problem is one that will have to be studied by more vigorous methods and with a more level-headed judgment than Professor Lombroso brings to bear. He does not tell us what he means by insanity, and his list of men of genius is a most astonishing one, whether judged by the names it omits or those it includes. His book, nevertheless, contains such a mass of material and clever hypothesis that it will probably provoke other studies in the same field, and will be in many ways useful to the discriminating student.

The report of the commissioners appointed in 1890 to inquire into the prison and reformatory system of Ontario (Toronto, Warwick & Sons) is a valuable collection and review of facts, although it contains little of fact, theory or recommendation that is altogether new to the students of penology. Its merits are due to the thoroughness with which the commissioners pursued their investigations, the great number of specific questions asked and answered, the intelligent examination and comparison of the more or less advanced penological systems on trial in various states of the United States, and the comprehensive review that the commissioners make of the whole subject of vice and crime as related to social conditions, education and punishment. All this matter has been put together so well that, besides being an account of crime and prison methods in Ontario in particular, the volume is a fairly complete handbook of penology in general. The commissioners attach comparatively little importance to illiteracy and poverty as causes of crime, and place first among evil conditions the want of proper parental control. All recent observations of criminal tendencies in our own country confirm the soundness of this judgment.

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In their recommendations, accordingly, the commissioners go to the root of the matter by suggesting legislation to keep children out of the streets at night, to give the authorities power to admonish parents, to prevent the arrest of children except in extreme cases where parental control cannot be brought to bear, to provide public playgrounds under responsible moral supervision, and to extend industrial training. Other valuable recommendations relate to the classification of prisoners; the treatment of common drunkards, for whom an industrial reformatory is suggested; the punishment of tramps by severe labor; and to the difficult problem of prison labor.

Under the title, *Seul de son Siècle* (Guillaumin et Cie), Viscount Combes de Lestrade has given to his countrymen an excellent translation of Mr. Edward Bellamy's *Looking Backward,* with critical comments appended to each chapter. These have been written with a serious purpose, for Viscount de Lestrade says in his preface that he regards Mr. Bellamy's romance as the most dangerous of all the communistic books that have ever come under his eyes. Not that there is anything new in the ideas, which are but "un amalgame des théories de Fourier, de celles de Proudhon et de celles de Marx," but because Mr. Bellamy has given to them "une forme facile, agréable." The criticisms are keen and usually sound, but to Christian socialism the weak objection is made that moral things are eternal while material things are ever changing, and that Christianity may therefore claim obedience as a religion but must not set itself up as a social constitution. The implied notion of man as a stationary soul in a progressive body was once "orthodox" political economy, unfortunately, but it turns Christianity upside down in a way that would have made St. Paul dizzy, and scientific political economy has no further use for it. A true criticism of Christian socialism must show that the scheme is bad morals as well as bad economics.

Miss Beatrice Potter has made a useful contribution to social economic literature in her history of *The Co-operative Movement in Great Britain* (Swan Sonnenschein & Co.). The story of the origin and growth of co-operation is told in a straightforward way, the merits and shortcomings of the system as now organized are impartially pointed out and the latest statistics are presented in tables and maps. The appendix contains also a bibliography, including Parliamentary reports. Miss Potter finds that the institution of co-operation, important as it has become, is far enough from realizing the ideal of its founders, which was, in brief, the elimination of profit and the substitution of a salaried official for the profit-maker. Entirely successful in all that pertains to the first point, co-operation has not yet demonstrated that individual profit-making is an unnecessary method of adjusting supply to demand. But

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Miss Potter has a strong faith that, through the concurrent action of co-operative organization in the sphere of consumption, and a federation of trade unions in the domain of production, supplemented by state action in education, land ownership and the administration of monopolies, industrial democracy can be established.

M. A. Naquet's compilation of socialism appeared so valuable to one of the English socialists, Mr. William Heaford, that he has translated it under the title: *Collectivism and the Socialism of the Liberal School* (Swan Sonnenschein, 1891). The praise of the work by the translator seems somewhat exaggerated, but the little book is certainly an animated and concise summary of the chief objections to the socialist panaceas. The author is not so extreme as many of his countrymen, and thinks the solution of the social question may be found in the education of the laborer and the development of trades unions, and in carrying out the principle that "collective action may and should be exercised on all occasions when the transference of a function from the individual to society has the effect, not of diminishing individual liberty, but of protecting, guaranteeing and developing that same liberty." He is also willing that the state should prevent, by taxation, the formation of too great individual fortunes, — a plan that will hopelessly discredit him with other opponents of socialism.

Ten years after its original publication Professor Hugo Eisenhart's *Geschichte der Nationaloekonomie* appears in a second edition (Jena, Fischer, 1891). At the time of its first appearance perhaps on the whole the most satisfactory general history of political economy, it has to-day been somewhat superseded by later works. The new edition contains a fuller discussion of Malthus and the poor-laws and a somewhat changed interpretation of Rodbertus. As before, the author devotes too much space to Carey and gives the same apotheosis of the "Aera Bismarck," while we search in vain for any account of the recent reaction in economics. A new edition should be up to the times.

The practical value of Smart's *Introduction to the Theory of Value* (Macmillan) is not measured by its size (88 pp.). It is a brief statement of the laws of value, as demonstrated largely by the Austrian economists; but it is written by a man of independent thought and of familiarity with the facts of business life. A knowledge of recent Austrian studies is essential to an understanding of the evolution of economic theory as such; and a knowledge of what are now the known laws of value is of greater importance as a preparation for scientific work. In eighty-eight pages the more essential laws of value are clearly and attractively stated. The relation that subjective measurements of utility sustain to the market prices of goods is not, indeed, exhaustively treated; in the entire literature of the subject the laws of value have not yet

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been completely stated; but enough is given in this volume to prepare a student for fruitful work.

The recent expiration of the commercial treaties of several European states has led to a flood of literature on the general topic. The most elaborate single work is the huge volume of Matlekovits, *Die Zollpolitik der Oesterreichisch-Ungarischen Monarchie und des Deutschen Reiches seit 1868* (Duncker und Humblot, 1891). The book of almost one thousand pages not only contains an exhaustive history of all the tariffs and commercial treaties of both Austria-Hungary and Germany down to the most recent laws, but it attempts to discuss the effects of customs duties in general and the particular economic results of the tariff policy of the two countries. Mr. Matlekovits is an ardent free trader, although he does not approve all the arguments sometimes employed by extremists. He is not quite sure as to the incidence of import duties, and does not entirely share the opinion of those who believe that the consumer bears the whole burden. But he thinks that protection does not protect and that the examples of the United States and Russia are of no value to continental Europe. The book is interesting mainly for its detailed account of the development of the chief industries and for the wealth of statistical information which it contains. It closes with a glowing appeal for the customs union between Germany and Austria.

Under the direction of Professor Cohn of Goettingen, Mr. Carl Copping Plehn, an American student, has published his doctor's dissertation on *Das Kreditwesen der Staaten und Städte der Nordamerikanischen Union* (Jena, Gustav Fischer, 1891). Although it contains nothing especially new to the student of public finance, the monograph is a meritorious collection of the facts and figures of local indebtedness during this century. The chapter on colonial credit conditions is based on the usual secondary authorities, but is not entirely satisfactory; and much of the early nineteenth century history might be amplified with advantage. In the theoretical discussion the author generally follows Adams's *Public Debts*. The monograph is a very convenient summary and deserves translation into English.

An elementary and clear account of the way in which the federal government levies and collects its revenue is given in William E. Burke's *Federal Finance* (Chicago, F. G. Shulte & Co., 1891). The preliminary chapter on "Taxation, Ancient and Modern," might better have been omitted; but the description of the administrative methods of our customs and internal revenue systems is concise and correct. The book is marred by a number of shocking wood-cuts.

In the first volume of the Camden Library, Mr. Hubert Hall, of the Public Record Office, describes *The Antiquities and Curiosities of the Exchequer* (New York, Armstrong, and London, E. Stock, 1891). The

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chief authorities on the exchequer have hitherto been the works of Madox and Thomas, and neither of these is likely to be superseded, except for the general reader, by the present volume. Mr. Hall succeeds in telling us some quaint stories connected with early English fiscal history. But the student of public finance will be interested chiefly in the chapters on the chess game and the exchequer problems, where the mediæval methods of budgetary accounting and control are picturesquely related in great detail. As Sir John Lubbock reminds us in the preface, however absurdly archaic the proceedings appear, we must remember that the "tallies" were still used in the English treasury until 1824.

Under the curious title of *The Grasshopper in Lombard Street* (London, 1892), Mr. John Biddulph Martin has published a volume as sumptuous in make-up and appearance as it is interesting and valuable in contents. The "Grasshopper" is the sign of the house of Martins in Lombard Street, the oldest banking firm in London. Mr. Martin traces the origin of the sign to Sir Thomas Gresham, who, as tradition relates, was a castaway infant, discovered by a casual passer-by through the chirping of a grasshopper. Although Mr. Martin is somewhat sceptical as to this, he discusses the honorable history of the firm from his goldsmith ancestors in the sixteenth century down to the present time. The volume is divided into four books, the second of which will be of special interest to the student of early banking and credit operations. Mr. Martin shows how the goldsmith's deposit notes gradually changed into the modern bank note, and that they did not finally disappear until 1843. The whole book is replete with curious learning, and Mr. Martin deserves the thanks of the student as well as of the public for converting what was originally meant to be a family history into a really valuable work for the general reader and the scientist. Among the many appendices, not the least interesting is a reprint of the famous pamphlet, *The Mystery of the New-Fashioned Goldsmiths or Bankers*, originally published in 1676.

"Studies in Comparative Ethnology" is too dignified a subtitle to affix to M. Élie Reclus's volume on *Primitive Folk* in the Contemporary Science Series (Scribners). There is very little in the book to suggest serious study of any kind on the part of its author, unless great industry in getting together from travellers' narratives their most piquant stories of savage life, can be called study. Not but that the book is essentially and in the main a true enough description of the social organization, the beliefs, morals (or immorals) and customs of uncivilized peoples, from the Esquimaux of the extreme north to the Kolarians of Bengal, but it is merely a popular account, written in the lightest vein, and with hardly a touch of serious criticism of alleged fact or of conflicting theories. In these respects it stands in marked

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contrast to a book like Dr. Daniel G. Brinton's *Races and Peoples* (N. D. C. Hodges), which also was written as a popular work, but which is at the same time an original and thought-provoking study of the problems of classification, origin, mental power and capacity for improvement.

In *Politics and Property, or Phronocracy* (Putnams), Mr. Slack Worthington sets forth his scheme for mitigating the social discontent and strife that are due to inequalities in economic conditions. The phronocratic ideal requires that taxation be levied on "property accumulation" and so adjusted as to check the concentration of individual wealth; that an educational and property test be imposed on voters; that foreign immigration of "all Caucasian races of self-sustaining capabilities" be encouraged; that the United States be extended to embrace the whole of North America; and that for any enterprise the government should take hold only when individual resources fail, and the general government only when the local authority is incompetent. The author's central idea is cumulative taxation, which he advocates with more vigor than originality. He would limit individual wealth to about $4,000,000, though this rule is not to apply to corporations. Mr. Worthington's style is popular rather than scientific, and his book is at least interesting.

In his *Public Lands and Agrarian Laws of the Roman Republic* (The Johns Hopkins Press) Professor Stephenson presents a useful and complete sketch of the facts and phases of Roman history indicated by the title. The author claims no original research, but a conscientious use is made of the standard authorities, both ancient and modern; and without any distracting flourish of learning a lucid and straightforward account is given of the causes, character and effects of the recurring agrarian legislation. To the allied social and political phenomena of Roman development just enough attention is given to throw needed light on the main topic. The monograph is to form a chapter in a more extensive work dealing comparatively with recent agrarian movements in England and America.

There have recently been issued a limited number of copies of the *Record of the City of New Amsterdam*, edited by Henry B. Dawson (Morrisania, 1867). The work is a fragment, and bears witness to an attempt made nearly a generation ago to publish a part of the records of the city of New York. The individuals who seem chiefly to have been concerned were Mr. Dawson, who was then editing the *Historical Magazine*, and D. T. Valentine, then clerk of the common council. A beginning was made, Westbrook's translation of the Dutch records being used. Nearly all the ordinances affecting the municipality from 1647 to 1656 were either printed or referred to by title. But O'Callaghan

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was at the same time at work upon his translation of the ordinances of New Netherlands from the Dutch records at Albany. This was published in 1868, and forms a pretty complete collection. Mr. Dawson seems at once to have abandoned his enterprise, and the records at the City Hall remain unprinted. Till they are wholly or in part published no satisfactory history of the municipality can be written. It is time for the scholars of the city to bestir themselves in this matter and follow the example of Boston. If the sense of organic life is really growing among us, it should reveal itself in the form of an awakening historic sense. A community which is really self-conscious will show an intelligent interest in its own past.

Mr. Samuel R. Gardiner's industry is further evidenced by the publication of his *Student's History of England* (Longmans, Green & Co.). It is designed for students who already have an elementary knowledge of the subject, but who are not prepared for advanced work. The amount of material included is ample for the purpose, and it is presented in a clear and attractive form. Naturally more space is given to the outline of social development — dress, manners, the arts — than to the growth of the English constitution. In the classification of the subject one novel feature may be particularly commended, and that is the including of the reign of Henry VII with those of the Lancastrian and Yorkish monarchs. This volume is supplied with all necessary genealogical tables. To the student, not the least useful feature of the book will be its numerous illustrations showing the progress of English architecture, changes in costume, development of the manual arts and, when modern times are reached, including excellent portraits of the nation's leaders. The maps which would properly find a place in a text-book have for greater convenience been bound separately. These form an atlas of English history which should be widely used not only in high schools but in colleges and universities.

"Let us now consider the position of Europe in the universe," says M. Ernest Lavisse at the close of his *General View of the Political History of Europe* (Longmans, 1891); and the sentence is characteristic of the book. The author's view is always a broad one, and his philosophy of European history in narrative form is very suggestive. His talent for compressing a movement into a phrase and summing up a period in an adjective enables him to say a good deal in the compass of 170 duodecimo pages, and must have made the work of his translator trebly difficult. Dr. Charles Gross, however, has not merely surmounted the difficulties of a faithful rendering, but has put the *General View* into thoroughly idiomatic and readable English.

Aus der Paulskirche (Göschen'sche Verlagshandlung, Stuttgart, 1892) is the title under which R. R. Schäfer reprints the letters written by

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Gustav Rümelin, in the years 1848 and 1849, to the *Schwäbische Merkur*. They are not a mere record of events, but a commentary on the events as they occur, written by a singularly clear-sighted member of the Frankfurt Parliament. They have the interest at once of a contemporaneous document and of prophecy since fulfilled; for Rümelin was one of the most earnest advocates of the "narrower Germany" under a Prussian emperor. He lived to see the programme of his party carried out, even to the alliance between the narrower Germany and Austria. Like most of the old Liberals of 1848, the chancellor of Tübingen University was a hearty admirer of the first chancellor of the German Empire, and once described himself, Schäfer tells us in his introduction, as ἀνὴρ Βισμαρκώτατος.

Bourinot's *Parliamentary Procedure and Practice in Canada* has attained the deserved dignity of a second edition (Montreal, Dawson Brothers, 1892). Revision and enlargement have made the work into a stout volume of 929 pages. A great part of the new matter consists in precedents to bring the various subjects down to the latest times. In an additional chapter at the end of the book the author explains in some detail the conventions and understandings which in the Dominion as in Great Britain play so important a part in the workings of the constitution. An appendix contains a comprehensive compilation of documents and forms essential to a complete understanding of the subject.

Under the title, *Social Statics, abridged and revised* (Appleton), Mr. Herbert Spencer has put together those portions of his original work which are not superseded by the recent volume on *Justice* and which are at the same time useful as supplementary to that volume. Bound together with these extracts is his well-known work on *The Man versus the State*. Despite the fragmentary character which the volume necessarily presents, it very well fulfils the purpose which called it forth. From it may be derived a satisfactory view of Mr. Spencer's first principles of political philosophy, in the form in which his matured judgment has worked them out. It is to this work and to that on *Justice* that his critics must now look for his politics, and the old *Social Statics* will cease to fill the place it has so long occupied as a target for adverse comment. The changes effected by the author's revision of the parts printed are mostly only in style, and *The Man versus the State* is practically unaltered.

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